Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JON WOOD, AS ADMINISTRATOR
OF THE ESTATE OF TIMOTHY BOURGEOIS, DECEASED,

Petitioner,

v.

GARNER FOOD SERVICES, INC., WILLIS
CORROON ADMINISTRATIVE SERVICES CORPORATION,
WILLIS CORROON CORPORATION OF GEORGIA

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN D. CALEY
Counsel of Record
151 Spring Street
Atlanta, GA 30303
(404) 614-3926

CHIP ROWAN
ROWAN & NEIS, L.L.P.
Peachtree Center,
North Tower
235 Peachtree Street,
Suite 1725
Atlanta, GA 30303
(404) 586-2350

Attorneys for Petitioner

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QUESTIONS PRESENTED

In light of this Court's recent decision in *Robinson v. Shell Oil Company*, —U.S.—, 117 S. Ct. 843 (1997), did the U.S. Court of Appeals for the Eleventh Circuit err in holding that the Americans with Disabilities Act does not protect former employees from discrimination in connection with employer-provided fringe benefits that are designed for the post-employment years?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Appendix	v
Opinions Below	1
Statement of Jurisdiction	2
Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. The Court of Appeals' decision conflicts with this Court's recent decision in *Robinson v. Shell Oil*	8
II. The ADA's anti-discrimination provision applies to former employees in the fringe benefits context	12
Conclusion	15

TABLE OF CITATIONS

	PAGE
Cases Cited:	
Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) .	6
Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.) *cert. denied*, 404 U.S. 939 (1971)	13
Brown v. New York State Teachers Retirement System, 834 F.2d 299 (2d Cir. 1987)	14
City of Los Angeles v. Manhart, 435 U.S. 702 (1978) .	14
EEOC v. Cosmair Inc., L'Oreal Hair Care Div., 821 F.2d 1085 (5th Cir. 1987)	14
EEOC v. J.M. Huber Corp., 927 F.2d 1322 (5th Cir.) *pet'n for reh'g den.*, 942 F.2d 930 (1991)	14
EEOC v. South Dakota Wheat Grower's Ass'n, 683 F. Supp. 302 (D.S.D. 1988)	14
Graboski v. Guiliani, 937 F. Supp. 258 (S.D.N.Y. 1996)	14
Northen v. City of Chicago, 841 F. Supp. 234 (N.D.Ill. 1993)	14
Parker v. Metropolitan Life Ins. Co., 875 F. Supp. 1321 (W.D. Tenn. 1995)	14
Robinson v. Shell Oil Co., —U.S.—, 117 S. Ct. 843 (1997)	*passim*
Schroeder v. Connecticut Gen'l Life Ins. Co., No. CA-93-M-2433 (D. Colo. Apr. 22, 1994)	14
Statutes Cited:	
28 U.S.C. §1254(1)	2
28 U.S.C. §1331	5
29 U.S.C. §1161	4
42 U.S.C. §2000e-4	10

PAGE

42 U.S.C. §2000e-5 10

42 U.S.C. §2000e-6 10

42 U.S.C. §2000e-8 10

42 U.S.C. §2000e-9 10

42 U.S.C. §12111 10,11

42 U.S.C. §12112 8-9,13

42 U.S.C. §12117 6,10

Other Authorities Cited:

H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 54, *reprinted in* 1990 U.S.C.C.A.N. 336 7

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Eleventh Circuit Dated August 2, 1996 ..... 1a

Appendix B — Opinion and Order of the United States District Court for the District of Columbia Filed March 17, 1994 ..... 29a

Appendix C — Denial of Petition for Rehearing and Suggestion for Rehearing *En Banc* by the United States Court of Appeals for the Eleventh Circuit Decided on December 12, 1996 ..... 36a

Appendix D — Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* Submitted August 2, 1995 ..... 38a

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Respondents.

Petition for a Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jon Wood, respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 89 F.3d 1523 and is reproduced in the Appendix filed herewith ("App.") at 1a. The opinion of the district court in this case is reported at 855 F. Supp. 371 and is reproduced at 29a. The Denial by the Court of Appeals of Petitioner's Petition for Rehearing and Suggestion for Rehearing *en Banc* is reported at 104 F.3d 373 and reproduced at 36a.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on August 2, 1996. The Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing *en Banc* on December 12, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title I of the Americans with Disabilities Act, 42 U.S.C. § 12112, is set forth below:

> (a) *General rule.* No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of *employees*, *employee compensation*, job training, and other *terms, conditions, and privileges of employment.*
>
> (b) *Construction.* As used in subsection (a), the term "discriminate" includes —
>
> > (1) limiting, segregating, or classifying a job applicant or *employee* in a way that adversely affects the opportunities or status of such applicant or *employee* because of the disability of such applicant or *employee*;
> >
> > (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or *employee* with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an *employment or referral agency*, labor union, *an organization providing fringe benefits to an employee of the covered entity*, or an organization providing training and apprenticeship programs;

(3) utilizing standards, criteria, or methods of administration —

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

* * *

(Emphasis added.)

STATEMENT OF THE CASE

This case stems from a majority decision of a panel of the U.S. Court of Appeals for the Eleventh Circuit which held that former employees are not protected from discrimination in the provision of employer-provided fringe benefits under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, even though the fruits of these fringe benefits are not realized until after the termination of employment. 89 F.3d at 1531 (App.A, 17a). As Judge Anderson noted in his dissent below,

> It is entirely reasonable to infer that Congress intended the Act's protection to extend to those individuals routinely and commonly included within such fringe benefit plans. It would be counter-intuitive, and quite surprising, to suppose (as the majority nevertheless does) that Congress intended to protect current employees' fringe benefits, but intended to then abruptly terminate that protection upon retirement or termination, at precisely the time that those benefits

> are designed to materialize. The structure of the statute, in clearly extending protection to fringe benefit plans, indicates that Congress intended protection for those routinely and commonly covered by such employer-provided plans.

89 F.3d at 1532 (Anderson, J., dissenting.) (App.A, 21a).

In this case, Timothy Bourgeois was employed at a Hardee's restaurant, owned and operated by Garner Food Services, Inc. ("GFS"). GFS sponsored and administered a group welfare benefit plan which provided health insurance coverage up to a $1,000,000 lifetime limit. Mr. Bourgeois participated in the health insurance benefit plan by virtue of his employment at GFS.

Mr. Bourgeois was diagnosed with AIDS in February, 1991, and GFS learned of his condition when he submitted health insurance claims for AIDS-related medical treatment. GFS fired Mr. Bourgeois in April, 1991 to avoid paying his future health insurance claims. After he was terminated by GFS, Mr. Bourgeois elected to continue his health insurance coverage pursuant to the Consolidated Omnibus Reconciliation Act of 1985, 29 U.S.C. § 1161 *et seq.* (1994) ("COBRA"). COBRA requires employers to allow former employees to elect continued health insurance coverage under the group plan for up to eighteen (18) months following termination. *Id.* Mr. Bourgeois paid the necessary premiums to continue his COBRA coverage.

At least partly because of Mr. Bourgeois' continued participation in the health insurance benefit plan after his termination, GFS amended the health insurance plan on October 1, 1991 to cap AIDS-related treatment. 89 F.3d at 1524 (App.A, 3a). Whereas all other conditions continued to be covered up to the $1,000,000 lifetime maximum under the plan with no annual limits, AIDS-related treatment was limited to $10,000 annually with a lifetime maximum limit of $40,000. 89 F.3d at 1524 (App.A, 3a-4a).

GFS ceased operations on March 31, 1992. Thereafter, Garner Fast Foods ("GFF") continued GFS's operations and became the sponsor of the health insurance plan with the AIDS related limitations.

Mr. Bourgeois died on September 6, 1992. Before he died, he exhausted the truncated benefits available to him under the AIDS cap limit and was denied payment for claims submitted in excess of the cap. 89 F.3d at 1525 (App.A., 4a).

The Administrator of the Estate of Timothy Bourgeois,[1] originally filed this action in the U.S. District Court for the Northern District of Georgia under Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA"). 855 F. Supp. 371 (N.D. Ga. 1994) (App.B, 29a). He alleged that defendants discriminated against Mr. Bourgeois by imposing the cap for his AIDS-related treatment on health insurance benefit coverage which Mr. Bourgeois elected to continue following his termination from employment. 28 U.S.C. §1331 provided the basis of subject matter jurisdiction in the District Court.

The district court granted a motion to dismiss that was filed jointly by defendants GFF and GFS on the ground that, as a former employee, Mr. Bourgeois was not protected from discrimination under Title I of the ADA. 855 F. Supp. 371 (App.B, 29a). Thereafter, the Estate dismissed claims against all defendants other than GFF and moved for reconsideration of the order of dismissal. The district court denied that motion, and Mr. Gonzalez appealed to the 11th Circuit Court of Appeals.

On appeal, a panel of the Court of Appeals affirmed the district court's order in a split decision. The majority, Judge Black and Senior Judge Henderson, held that even though the ADA prohibits disability-based discrimination in employer-sponsored health insurance plans like the one in this case, Mr. Bourgeois was not entitled to the ADA's protection because he was not a currently active employee of GFF when this suit was filed. 89 F.3d at 1525 (App.A, 7a).

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[1] Petitioner Jon Wood is now the Administrator of Mr. Bourgeois' estate.

Circuit Judge Anderson dissented, noting that the majority's decision conflicted with the binding precedent of *Bailey v. U.S.X. Corp.*, 850 F.2d 1506 (11th Cir. 1988). In *Bailey*, the Eleventh Circuit Court of Appeals construed identical language in Title VII and held that the anti-discrimination provisions protected former employees as well as current employees. *Id.* Judge Anderson also noted that because the fruits of many fringe benefits such as pension plans and deferred compensation are designed to be realized in the post-employment years, the ADA's protection against discrimination in fringe benefits necessarily protected former employees as well as currently active ones. 89 F.3d at 1535 (App.A., 27a). Petitioner filed a Petition for Rehearing and Suggestion for a rehearing *en banc*, but his request was denied on December 12, 1996. 104 F.3d 373 (11th Cir. 1996) (App.C, 36a).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision conflicts with this Court's decision in *Robinson v. Shell Oil Co.*, — U.S. —; 117 S. Ct. 843 (1997). The Court should grant the writ of certiorari in order to resolve that conflict.

In *Robinson*, this Court unanimously decided that the term "employee" in Title VII was ambiguous, and must be construed "by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 117 S. Ct. at 846. The Court held that in the context of Title VII's provision protecting employees against retaliation, the term "employees" includes former employees. 117 S. Ct. at 849.

The *Robinson* analysis is applicable in ADA cases. Congress intended for the ADA to be construed in a manner similar to Title VII. The text of the ADA expressly incorporates the "powers, remedies and procedures set forth in Title VII". 42 U.S.C. §12117(a). Also, much of the language in the ADA mirrors language found in Title VII. For example, both define the term "employee" to mean "an individual employed by an employer."

The House of Representatives Education and Labor Committee wrote:

> Several of the definitions set out in Title VII of the Civil Rights Act of 1964 are adopted or are incorporated by reference in this legislation —i.e.,...employer, person...the term "employee" means an individual employed by an employer.

H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 54, *reprinted in* 1990 U.S.C.C.A.N. 336.

> The provisions in Title I of this bill use or incorporate by reference many of the definitions in title VII of the Civil Rights Act of 1964 (*employee*, employer...).

Id. at 149, *reprinted in* 1990 U.S.C.C.A.N. 432.

> [T]itle I of this legislation incorporates by reference the definition of the term "employer" and "employee" used in title VII of the Civil Right Act of 1964....

Id. at 76, *reprinted in* 1990 U.S.C.C.A.N. 359.

When the *Robinson* analysis is applied in this case, the term "employees" in the ADA must be construed to include former employees. The ADA's protection against discrimination in fringe benefits available by virtue of employment extends to former employees as well as currently active ones. To hold otherwise, as the Court of Appeals did, would undermine the ADA's broad purpose of eliminating discrimination against individuals with disabilities with respect to an important segment of post-employment benefits available by virtue of the employment relationship. Because the Court of Appeals' decision in this case conflicts with the *Robinson* analysis, this Court should grant a writ of certiorari to resolve the conflict.

I.

THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S RECENT DECISION IN ROBINSON V. SHELL OIL CO.

Petitioner argues that the term "employee" in the ADA, like the identical term construed by the Court in *Robinson*, is ambiguous, and includes former employees in the context of discrimination in fringe benefits available by virtue of the employment relationship.

The pertinent provision of the ADA at issue in this case provides:

> (a) *General rule.* No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of *employees, employee compensation*, job training, and other *terms, conditions, and privileges of employment.*
>
> (b) *Construction.* As used in subsection (a), the term "discriminate" includes —
>
> > (1) limiting, segregating, or classifying a job applicant or *employee* in a way that adversely affects the opportunities or status of such applicant or *employee* because of the disability of such applicant or *employee*;
> >
> > (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or *employee* with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an *employment or referral agency*, labor union, an *organization providing fringe benefits to an employee of the covered entity*, or an

organization providing training and apprenticeship programs;

(3) utilizing standards, criteria, or methods of administration —

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

* * * *

42 U.S.C. §12112. [Emphases added.]

The Court wrote in *Robinson* that:

> [the] first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.... The plainness or ambiguity of statutory language is determined by[: 1] reference to the language itself, [2] the specific context in which the language is used, and [3] the broader context of the statute as a whole.

117 S. Ct. at 846.

Consideration of the factors set forth in *Robinson* shows that the term "employee," as used in the ADA, is ambiguous as to whether it excludes former employees from protection against discrimination in fringe benefits. This Court decided in *Robinson* that the meaning of the term "employee" in Title VII is ambiguous. 117 S. Ct. at 849. Because the ADA imported the Title VII

term "employee," it follows that the term is ambiguous in the ADA as well.

Just like the Title VII provision at issue in *Robinson, supra*, the term "employee" in the ADA has no temporal qualifier that compels the conclusion that only present employees are covered. The definition of "employee" in §12111(8) ("an individual employed by an employer") likewise lacks a temporal limitation, and is consistent with either current or past employment. *See Robinson*, 117 S. Ct. at 846-47.

The term "employee" is used in the various provisions of the ADA to mean different things. For instance, among the remedies available for a violation of the ADA is "reinstatement". 42 U.S.C. §12117; 42 U.S.C. §s 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9. Reinstatement necessarily affects former employees. Otherwise, the remedial scheme for discriminatory discharge would make no sense. Therefore the term "employee" includes former employees in that context. *See Robinson*, 117 S. Ct. at 847.

Furthermore, the remedial scheme for violations of the ADA permits an "employee or applicant for employment... [to] file a civil action." 42 U.S.C. §2000e-5. When the violation is discriminatory discharge, as is often the case, the term "employee" necessarily includes former employees. *See Robinson*, 117 S. Ct. at 847.

Other provisions of the ADA indicate that the term "employee" means more than just currently active employees. For example, as the Court held in *Robinson, supra*, former employees are necessarily included in the anti-retaliation provisions of Title VII. 117 S. Ct. at 847. The same result logically follows in the context of the ADA's anti-retaliation provision.

The Court of Appeals decided that the term "employee" referred only to a currently active employee, citing the statute's reference to "qualified individuals with a disability." 89 F.3d at

1530-31 (App.A, 16a). A "qualified individual with a disability" is defined in the ADA as:

> an individual person who, with or without reasonable accommodation is able to perform the essential functions of the *employment position* he holds or desires.

42 U.S.C. §12111(8)(emphasis added).

The phrase "qualified individual with a disability" is ambiguous. Again, the phrase has no temporal qualifier, and is consistent with present, prospective, and former employees. For instance, in the context of reinstatement for discriminatory discharge, a qualified individual with a disability necessarily refers to a former employee who can perform the essential functions of the employment position he desires. In that scenario, the employment position that he desires is his former job.

Moreover, as the Equal Employment Opportunity Commission argued in its *amicus curiae* brief below, the "employment position" referred to in § 12111(8) is not necessarily a job. (App.D., 48a). In the context of former employees who receive post-employment benefits such as pensions or continued health insurance coverage, the "employment position" held by the former employee is the position of post-employment benefits recipient. (App.D, 48a).

Even if the phrase "qualified individual with a disability" is construed to refer only to current employees and applicants for employment, that observation does not definitively decide the question of whether the term "employee" is ambiguous. At most, the Court of Appeals' reliance on the "qualified individual with a disability" language shows that the sections of the ADA which concern issues of *current* or *prospective* employment require that the "employee" or "applicant" in question be able to perform the "essential functions of the job he holds or desires." While this requirement makes sense in the context of present or prospective employees, it does not follow that the ADA's protection is likewise limited in all other contexts, as the Court of Appeals erroneously concluded. *See Robinson*, 117 S. Ct. at 847 ("[T]hose

examples at most demonstrate that the term "employee" may have a plain meaning in the context of a particular section — not that the term has the same meaning in all other sections and in all other contexts.") Instead, because the term "employee" in the ADA necessarily includes former employees in some contexts, the term is ambiguous and "each section must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *See Robinson*, 117 S. Ct. at 847.

Therefore, the term "qualfied individual with a disability" must be read in context and in view of the ADA's overarching purposes. *See Robinson*, 117 S. Ct. at 846. In view of the ADA's express prohibition against discrimination in fringe benefits, it makes no sense to exclude former employees from the Act's protection when many fringe benefits are specifically designed for the post-employment years.

In sum, the terms "employee" and "qualified individual with a disability" are ambiguous. The determination of whether former employees are encompassed within these terms must be determined by the specific nature of the claim raised and the broader purposes of the ADA as a whole.

II.

THE ADA'S ANTI-DISCRIMINATION PROVISION APPLIES TO FORMER EMPLOYEES IN THE FRINGE BENEFITS CONTEXT.

Having established that the terms "employee" and "qualfied individual with a disability" are ambiguous, the broader context of the statute must be considered in order to resolve the ambiguities in this case. *See Robinson*, 117 S. Ct. at 848. The broader context of the ADA's protection against discrimination in fringe benefits compels the conclusion that former employees enjoy the same protection as current employees. As Judge Anderson noted in his dissent below:

> It is a matter of common knowledge that fringe benefit plans routinely and commonly cover retirees and other

> former employees. Indeed, pension and profit-sharing plans are designed primarily for the post-employment years.

89 F.3d at 1532 (App.A, 21a). (Anderson, J., dissenting).

If former employees were not protected from discrimination in fringe benefits, the ADA's remedial purpose would be undermined, and employers would have perverse incentives to evade that Act's purpose of eliminating discriminatory barriers for the disabled in all aspects of the employment relationship. *See Robinson*, 117 S. Ct. at 848-49.

Permitting former employees to challenge discrimination in the provision of post-employment benefits is the only logical way to effectuate the purpose of eliminating discrimination in the provision of those benefits. The Court of Appeals' more restrictive reading would undermine the ADA's remedial purposes by barring all challenges to post-employment discrimination that affects the terms, conditions, and privileges of the employment relationship. 42 U.S.C. § 12112(a). Because many employment benefits, such as pensions, disability retirement, and health insurance continuation, as in this case, do not even become available until after employment terminates, it makes no sense to bar former employees from challenging discrimination in the provision of those benefits. *See Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1189-90 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (holding that retirement benefits are within "compensation, terms, conditions, or privileges of employment" covered under Title VII). To hold otherwise would be to allow an employer first to fire an employee and then discriminate against him with impunity in the post-employment period by capping his health insurance coverage, as in this case, or denying him other post-employment benefits. It is inconceivable that Congress intended this gap in the protection afforded by the ADA.

Finally, construing the ADA to protect former employees in connection with fringe benefits is consistent with well-reasoned court decisions from across the country. While court decisions on this point are divided, numerous courts have held that

individuals can challenge discrimination in fringe benefits under Title VII and other federal civil rights laws, even though they are not current employees. *See, e.g., City of Los Angeles Dept. of Water and Power v. Manhart,* 435 U.S. 702 (1978) (former employees challenge sex-based mortality tables in pension plan under Title VII); *Brown v. New York State Teachers Retirement System,* 834 F.2d 299 (2d Cir. 1987) (retired teachers challenge sex-based mortality tables in pension plan); *EEOC v. J.M. Huber Corp.,* 927 F.2d 1322 (5th Cir.) *pet'n for reh'g den.,* 942 F.2d 930 (1991)(former employee can challenge withholding of retirement fringe benefits under Title VII); *EEOC v Cosmair Inc., L'Oreal Hair Care Div.,* 821 F.2d 1085 (5th Cir. 1987) (former employee challenges retaliatory discontinuance of health benefits under Age Discrimination in Employment Act); *EEOC v. South Dakota Wheat Growers Ass'n,* 683 F. Supp. 1302, 1304-5 (D.S.D. 1988) (former employee can challenge sex discrimination in continuation health coverage for his wife because "the post-employment insurance coverage was available because of his earlier employment status. Had there not been an employment relationship, there would not have been a fringe benefit such as the post-employment insurance.")

Some courts that have considered the issue under the ADA have also held that former employees are protected. *See, Graboski v. Guiliani,* 937 F. Supp. 258 (S.D.N.Y. 1996) (expressly rejecting the Eleventh Circuit's decision in *Gonzales*); *Northen v. City of Chicago,* 841 F. Supp. 234 (N.D. Ill. 1993) (disabled former police officers can bring ADA challenge to requirement that they pay for their health insurance); *Schroeder v. Connecticut Gen'l Life Ins. Co.,* No. CA-93-M-2433 (D. Colo. Apr. 22, 1994) (former employee can bring ADA challenge to coverage limit in long-term disability insurance under ADA). *But see Parker v. Metropolitan Life Ins. Co.,* 875 F. Supp. 1321 (W.D. Tenn. 1995) (no standing of long-term disability plan participant to sue former employer over allegedly discriminatory plan provision).

The decisions cited above comport with the broader content and purpose of the ADA and represent the correct construction

of the statute as it relates to discrimination in post-employment fringe benefits. These decisions also conform with this Court's decision in *Robinson*. Because the Eleventh Circuit's decision does not conform with *Robinson*, the Court should grant a writ of certiorari in this case.

CONCLUSION

Because the Circuit Court's decision conflicts with this Court's decision in *Robinson v. Shell Oil,* the Court should grant the Petitioner a writ of certiorari in order to resolve this conflict.

Respectfully submitted,

STEVEN D. CALEY
Counsel of Record
151 Spring Street
Atlanta, GA 30303
(404) 614-3926

CHIP ROWAN
ROWAN & NEIS, L.L.P.
Attorneys for Petitioner
Peachtree Center, North Tower
235 Peachtree Street, Suite 1725
Atlanta, GA 30303
(404) 586-2350

No. 95-8533

United States Court of Appeals for the Eleventh Circuit

AUGUST 2, 1996, DECIDED

AUGUST GONZALES, AS ADMINISTRATOR OF THE ESTATE OF TIMOTHY BOURGEOIS, DECEASED,

Plaintiff-Appellant,

v.

GARNER FOOD SERVICES, INC.; WILLIS CORROON ADMINISTRATIVE SERVICES CORPORATION; WILLIS CORROON CORPORATION OF GEORGIA,

Defendants,

GARNER FAST FOODS, INC.,

Defendant-Appellee,

AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC); AMERICAN MEDICAL ASSOCIATION, AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN FOUNDATION FOR AIDS RESEARCH, GAY MEN'S HEALTH CRISIS; AMERICAN CIVIL LIBERTIES UNION, THE ARC, GAY AND LESBIAN ADVOCATES AND DEFENDERS, INC., NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL ASSOCIATION OF PEOPLE WITH AIDS, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL MINORITY AIDS COUNCIL, EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amici Curiae.

89 F.3d 1523; 1996 U.S. App. LEXIS 19012; 20 E.B.C. 1601; 10 Fla. Law W. Fed. C 230; 5 Am. Disabilities Cas. (HNA) 1202

SUBSEQUENT HISTORY: [**1] As Amended. Suggestion for Rehearing *En Banc* Denied December 12, 1996, Reported at: 1996 U.S. App. LEXIS 35253.

PRIOR HISTORY: Appeal from the Unites States District Court for the Northern District of Georgia. (No. 1:93-CV-1639-JOF). J. Owen Forrester, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): Sharon Nelson Hill, Milton Dale Rowan, "Chip", KOVAL & ROWAN, P.C., Atlanta, GA. Sharon N. Hill, TROUTMAN SANDERS LLP, Atlanta, GA.

AMICI CURIAE for Am. Civil Liberties: Cary LaCheen, Edward Copeland, NY Lawyers for the Public Interest, Inc., New York, NY.

AMICI for Am. Assoc. Retired Persons: Cathy Ventrell-Monsees, Sally Dunaway, Washington, DC.

AMICI for Am. Medical Assoc.: Catherine A. Hanssens, Lambda Legal Defense & Education Fund, Inc., New York, NY.

AMICI for EEOC: Carolyn L. Wheeler, C. Gregory Stewart, Gwendolyn Young Reams, Mary L. Clark, Ofc. of Gen. Cnsl, Washington, DC.

ATTORNEY(S) FOR APPELLEE(S): GARNER: Eric Brandt Rauss, Ofc. of Eric Brandt Reuss, Atlanta, GA. WILLIS CORROON. J. Robert Persons, III, Gregory A. Gunter, Lord, Bissell & Brook, Atlanta, GA.

JUDGES: Before ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

OPINION BY: BLACK

OPINION: [*1524] BLACK, Circuit Judge:

Appellant August Gonzales filed this action under Title I of the Americans With Disabilities Act of 1990 (ADA),[1] alleging that Defendants discriminated against a former employee,

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[1] 42 U.S.C. § 12101 et seq. (1994). Appellant initially sought relief under both § S10 of the Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (1994), and the ADA, but subsequently dismissed the ERISA claim.

Timothy Bourgeois, by imposing a cap for AIDS-related treatment on health insurance benefit coverage Bourgeois elected to continue following his termination. The district court granted a motion to dismiss jointly filed by Garner Fast Foods, Inc. (GFF) and Garner Food Services, Inc. (GFS). Thereafter, Appellant dismissed claims against all Defendants other than GFF and moved for reconsideration of the order of dismissal. This motion was denied, and Appellant appeals. We affirm.

[**2]

I. BACKGROUND[2]

Bourgeois was employed at a Hardee's restaurant, owned and operated by GFS. GFS sponsored and administered a group welfare benefit plan which provided health insurance coverage up to a $1 million lifetime limit. Bourgeois participated in the health insurance benefit plan through his employment.

Bourgeois was diagnosed with AIDS in February of 1991, and GFS learned of his condition when he submitted health insurance claims for medical treatment. GFS discharged him in April 1991 to avoid paying future health insurance claims. Following his termination, Bourgeois paid the necessary premiums to continue his health insurance benefit coverage pursuant to the Consolidated Omnibus [**3] Budget Reconciliation Act of 1985 (COBRA). [3]

At least partly because of Bourgeois' continued participation in the health insurance benefit plan after his discharge, GFS amended the plan on October 1, 1991, to cap AIDS-related treatment to $10,000 annually with a lifetime maximum limit of

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[2] Since the district court decided this case on a motion to dismiss, we have taken the allegations in Appellant's complaint as true and have construed them liberally in favor of Appellant. See *Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.*, 382 U.S. 172, 174-75, 86 S. Ct. 347, 349, 15 L. Ed. 2d 247 (1965).

[3] 29 U.S.C. § 1161 et seq. (1994). COBRA amended ERISA to require each employer to allow former employees to elect to continue coverage under the employer's group health insurance plan for up to 18 months following termination of employment. Id.

$40,000. GFS ceased operations on March 31, 1992. Thereafter, GFF continued GFS' operations, and became the sponsor of Bourgeois' plan.[4] [*1525] Before he died on September 6, 1992, Bourgeois had exhausted the benefits available to him under the AIDS cap limit and was denied payment for claims submitted in excess, totaling approximately $90,000.

[**4]

II. STANDARD OF REVIEW

The district court's denial of Appellant's motion for reconsideration is reviewed for abuse of discretion. See *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 806 (11th Cir.1993), *cert. denied,* 510 U.S. 1040, 114 S. Ct. 683, 126 L. Ed. 2d 651 (1994). Since our review requires us to focus on conclusions of law made by the district court in granting the motion to dismiss, we review these questions of law de novo. *See O'Reilly v. Ceuleers,* 912 F.2d 1383, 1385 (11th Cir.1990).

III. DISCUSSION

The ADA was enacted on July 26, 1990, but did not become effective until July 26, 1992.[5] Pub.L. No. 101-336, § 108, 104 Stat.

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[4] At the outset, GFF denies liability on the bases that Bourgeois worked only for GFS and not GFF and never sought employment from GFF. Citing this Court's decision in *Bud Antle, Inc. v. Eastern Foods, Inc.,* 758 F.2d 1451 (11th Cir.1985), Appellant counters that GFF is liable under theories of de facto merger and mere continuation because GFF took over the operations of the defunct GFS with identical officers, directors, and virtually an identical sole shareholder, maintained the same health plan and AIDS cap first implemented by GFS, and assumed all liabilities of GFS. We decline to resolve this issue. Given our holding that Appellant is not entitled to relief under the ADA, GFF is not liable even if it is a successor in interest to GFS.

[5] The dissent refers to the two year span between the enactment and effective dates and a "phase-in period," the purpose of which was "to give employers time to take those actions necessary to come into compliance with the requirements of the Act"; however, the dissent cites no authority indicating this was Congress' intent.

327, 337 (1990). Title I of the ADA addresses disability discrimination by employers.[6] As applied to private employers, Title I is not retroactive. *See O'Bryant v. City of Midland*, 9 F.3d 421, 422 (5th Cir.1993); *see also* 1990 U.S.C.C.A.N. 601 (statement by President George Bush upon signing S. 993). Against this background, courts have concluded that Title I applies only to wrongful acts committed after the effective date of the ADA. *See, e.g., O'Bryant,* 9 F.3d at 422. Since the AIDS [**5] cap was implemented in October 1991, prior to the effective date of the ADA, GFF argues from the outset that Appellant's claim is barred.

Appellant counters that his claim is actionable on the basis that the AIDS cap "endured" after the effective date of the ADA, thereby making GFF's refusal to pay health benefits from then until Bourgeois' death a continuing violation of the Act. In determining whether maintenance of the AIDS cap after July 26, 1992, constituted a continuing violation of the ADA, this Court must distinguish between the present consequences of a one-time violation, [**6] which would not qualify as a continuing violation, and the continuation of the violation into the present, which would. *See Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796 (11th Cir.1992). As did the district court, we will assume for purposes of our analysis that the denial of AIDS-related health-care benefits after the effective date of the ADA could constitute a continuing violation of the Act. *See Bazemore v. Friday,* 478 U.S. 385, 395, 106 S. Ct. 3000, 3006, 92 L. Ed. 2d 315 (1986) ("A pattern of practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date."); *Beavers*, 975 F.2d at 797-98 (holding that the continued maintenance of a pre-Title VII discriminatory benefits policy is actionable after the effective date of Title VII as a continuing violation of the statute).

GFF argues that even if maintaining the AIDS cap beyond the effective date of the ADA could constitute a continuing

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[6] It is undisputed that GFS met the ADA definition of "employer." *See* 42 U.S.C. § 12111(5)(A).

violation, Appellant fails to state a prima facie case of discrimination under Title I of the Act. The Title I general rule states: "No covered entity shall discriminate [**7] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a) (emphasis supplied). A "qualified individual with a disability" (QID) [*1526] is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires . . . "[7] *Id.* § 12111(8) (emphasis supplied).

The parties do not dispute that AIDS is a disability recognized under the ADA.[8] It is further undisputed that fringe benefits, such as employer-provided health benefits, [**8] are one set of the "terms, conditions, and privileges of employment" protected from unlawful discrimination under the ADA.[9] Thus, Appellant reasons, once Bourgeois took advantage of the opportunity to participate in the group health insurance plan, he was entitled to be provided with health insurance in a nondiscriminatory manner.

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[7] Thus, § 12112(a) does not utilize the term "individual" in a broad manner, as suggested by the dissent, but rather within a specific term of art—"qualified individual with a disability "—explicitiy defined in § 12111(8).

[8] *See* 28 C.F.R. §§ 35.104 (defining "disability" to include HIV disease at (1)(ii)), 36.104 (same at (1)(iii)) (1995).

[9] This is clear from the statute, *see, e.g.*, U.S.C. §§ 12101(a)(5), 12112(a), (b)(2), (b)(4), the legislative history, *see* H.R.Rep. No. 485(II), 101st Cong., 2nd Sess. 59 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 341 ("Employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability."); H.R.Rep. No. 485(III), 101st Cong., 2nd Sess. 71 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 494, and the interpretive regulations, *see, e.g.*, 29 C.F.R. § 1630.4(f) (it is unlawful for an employer to discriminate on the basis of disability in the provision of "fringe benefits available by virtue of employment"); 56 Fed.Reg. 35726, 35746 (July 26, 1991) (EEOC Interpretative Guidance on 29 C.F.R. §§ 1630.4, 1630.5).

[**9]

Bourgeois does not satisfy the QID requirement under the plain language of the ADA, however, because he neither held nor desired to hold a position with GFF at or subsequent to the time the alleged discriminatory conduct was committed. Rather, Bourgeois was a participant in the health benefit plan only by virtue of his status as a former employee. Appellant does not contest this conclusion, but argues that since the fruits of many fringe benefits are realized during the post-employment period, Congress must have intended former employees to be protected under the ADA as well.

Neither QID definition nor the ADA's definitions of "employee" and "discriminate" provide support for Appellant's position. The ADA defines "employee" as "an individual employed by an employer."[10] *Id.* § 12111(4) (emphasis supplied). Further, § 12112(b) provides:

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee; [**10]

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter . . . ;

. . .

[10] This definition directly rebuts the suggestion of the dissent that "nothing in the plain meaning of [the] term ['employee'] limits its scope to current employees as opposed to former employees." [**11]

> (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee . . . or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability . . . ;
>
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and [*1527] is consistent with business necessity.[11]

Id. § 12112(b) (emphases supplied).

Moreover, the legislative history of the ADA specifically states that the purpose of including the phrase "essential functions" within the QID definition is to "ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., nonmarginal functions of the job in question [sic]." H.R.Rep. No. 485(II), 101st Cong., 2nd Sess. 55 (1990), reprinted in 1990 U.S.C.C.A.N. 303,337 (emphasis supplied). Thus, a review of both the ADA and its legislative history suggests that Congress intended to limit the protection of Title I to either employees performing, or job applicants who apply and can perform, the essential functions of available jobs which their employers maintain.

Appellant argues against such a conclusion on the basis that other legislative history of the [**12] ADA, as well as Equal

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[11] Although the dissent maintains § 12112(b)(6) does not specifically "refer to employees or applicants," the plain language of the provision contemplates discrimination encountered solely by job applicants and current employees.

Employment Opportunity Commission (EEOC) interpretive guidance, suggest that courts should construe the ADA by analogy to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. (1994). As does the general rule of Title I of the ADA, the general rule of Title VII prohibits discrimination with respect to the "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a). Further, the Supreme Court found that health insurance coverage made pursuant to an employment relationship is a term, condition, or privilege of employment as defined under the Title VII general rule. *Newport News Shipbuilding and Dry Dock Co. V. EEOC*, 462 U.S. 669, 682, 103 S. Ct. 2622, 2630, 77 L. Ed. 2d 89 (1983).

With respect to employment-related terms, legislative history of the ADA states that the provisions in Title I use or incorporate by reference several of the definitions in Title VII, including the term "employee." H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 54, reprinted in 1990 U.S.C.C.A.N. 303, 336. The EEOC has observed that the definitions in Title I "are identical, or almost identical" to those found in Title VII and should be [**13] given the same meaning, 56 Fed.Reg. 35726, 35740 (July 26, 1991) (EEOC) Interpretive Guidance on 29 C.F.R. § 1630.2(a)-(f)). The EEOC has further stated that but for a Title VII exception for public officials not found in the ADA, "the term 'employee' has the same meaning [under the ADA] that it is given under Title VII." Id.

Against this background, Appellant points to the Title VII retaliation statute, contending that although the statute on its face only protects "employees" and "applicants for employment" from illegal retaliation, 42 U.S.C. § 2000e-3, courts have broadened the class of protected persons under the statute to include former employees. Indeed, in construing the retaliation statute, this Court reasoned:

> While it is true that the language of a statute should be interpreted according to its ordinary, contemporary and common meaning . . . this plain-meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the

> statute. In the instant case, a strict and narrow interpretation of the word "employee" to exclude former employees would undercut the obvious remedial purposes of Title VII.

Bailey v. [**14] *USX Corp.*, 850 F.2d 1506, 1509 (11th Cir.1988) (citation omitted).

In further support of his argument, Appellant relies on *EEOC v. Cosmair, Inc., L'Oreal Hair Div.*, 821 F.2d 1085 (5th Cir.1987), an anti-retaliation case involving the receipt of post-employment fringe benefits. In *Cosmair,* the Fifth Circuit expanded the meaning of the term "employee" to include former employees so long as the disability-based discrimination is related to or arises out of the employment relationship. 821 F.2d at 1088. The statute at issue in *Cosmair* was the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq. (1994); *Bailey* was a Title VII case. Since this Court in *Bailey* cited *Cosmair, see Bailey,* 850 F.2d at 1509, however, Appellant [*1528] contends that former employees suing in this Circuit for retaliation affecting post-employment fringe benefits have a cause of action under Title VII, and by analogy, Title I of the ADA. Thus, Appellant reasons, because Bourgeois' participation in the health benefit plan arose out of his employment, and the refusal to pay benefits arguably constituted a continuing violation into the effective period of ADA, [**15] he is entitled to recover damages for discrimination suffered by Bourgeois after the effective date of ADA.

Finally, Appellant cites *EEOC v. South Dakota Wheat Growers Ass'n*, 683 F. Supp. 1302 (U.S.D.1988), in which the issue considered was whether Title VII governed a health insurance policy "provided after termination of employment, as a consequence of such employment." 683 F. Supp. at 1304. In deciding that question in the affirmative, the district court found that "discrimination arising out of the employment relationship is unlawful regardless of 'whether or not the person discriminated against is an employee at the time of [the] discriminatory conduct.' " Id. (*quoting Pantchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1055 (2d Cir.1978)). The court concluded that it was

unlawful for an employer to discriminate against a former employee in the provision of post-employment health insurance coverage. 683 F. Supp. at 1304-05.

Based upon the foregoing, Appellant argues this Court should look to Title VII in seeking to understand ADA employment terms and conclude that former employees are included within the scope of ADA protection. We disagree. The cardinal rule of [**16] statutory construction is that the language of a statute should be interpreted in accordance with its ordinary, contemporary, and common meaning. *Bailey,* 850 F.2d at 1509. Although we may resort to the EEOC's interpretive guidelines for assistance in our analysis, they are not controlling upon this Court. *See Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986). Absent clearly expressed legislative intent to the contrary, the plain language of the statute should be conclusive. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). In adhering to the cardinal rule, we find the plain language of the ADA clearly demonstrates the intent of Congress to limit the scope of the Act to only job applicants and current employees capable of performing essential functions of available jobs. We find no clearly expressed legislative intent suggesting that former employees such as Bourgeois should be covered under the Act as well.[12]

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[12] Citing no authority, the dissent contends "it would be counter-intuitive, and quite surprising, to suppose (as the majority nevertheless does) that Congress intended to protect current employee's fringe benefits, but intended to then abruptly terminate that protection upon retirement or termination, at precisely the time that those benefits are designed to materialize." Since we find no clearly expressed legislative intent of Congress to suggest that former employees should be included within the scope of ADA protection, we respectfully disagree.

Appellant cites no binding authority demonstrating that the ADA protects former employees. And, with two exceptions, the only cases cited by Appellant discussing former employees' rights to sue their former employers involve claims which arose under explicit anti-retaliation provisions contained in Title VII and the ADEA.[13] These retaliation cases are easily distinguishable.

[**18]

This Court in *Bailey* cautioned that courts should avoid a literal interpretation of a statute when such an approach would frustrate [*1529] the statute's central purpose. *Bailey,* 850 F.2d at 1509. There is no such risk in this case. As this Court in *Bailey* recognized, the expansion of the term "employee" to confer standing to sue upon former employees claiming retaliation is necessary to provide meaning to anti-retaliation statutory provisions and effectuate congressional intent.[14] *Id.* There are, however, no allegations of retaliation in this case, and excluding former employees from protection under the Act is not inconsistent with the policies underlying the statute. To the contrary, interpreting the ADA to allow any disabled former employee to sue a former employer essentially renders the QID requirement under the Act, that an individual with a disability hold or desire a

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[13] Thus, contrary to the dissent's broad assertion that "when Congress enacted the ADA in 1990, it was clearly established [in] Title VII case law that the term 'employee' includes former employees," the overwhelming majority of Title VII cases which have so found have been in the retaliatory context. The only exceptions cited by Appellant are *Wheat Growers,* 683 F. Supp. at 1302, a Title VII case not binding upon this Court, and *Northen v. City of Chicago,* 841 F. Supp. 234 (N.D.Ill.1993). In *Northen,* former Chicago police officers receiving disability pensions sued the city over its decision to require the retirees to pay for health insurance. 841 F. Supp. at 235. In denying the city's motion to dismiss, the district court held that "at the initial pleading stage it is too early to conclude that retirees are not covered employees under the ADA." *Id.* at 236. We are not bound by *Northen,* and the decision is not persuasive in that the court dismissed the case without ever addressing whether the retirees were in fact QIDs under the ADA.

[14] Again with no support, the dissent counters:

(footnote continues)

position the essential functions of which he or she can perform, meaningless.

[**19]

In the alternative, Appellant attempts to redefine the QID requirement by reference to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994). Appellant correctly notes that decisions interpreting the Rehabilitation Act, the ADA's statutory predecessor, are relevant precedent in interpreting the provisions of the ADA. H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304. Under § 504, no "otherwise qualified handicapped individual" may be discriminated against under any federally funded activity or program. 29 U.S.C. § 794. As the phrase "otherwise qualified handicapped individual" is not defined in the Rehabilitation Act, the Supreme Court attempted to do so in *Southeastern Community College v. Davis,* 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L. Ed. 2d 980 (1979). In *Davis,* the Supreme Court considered a claim of a licensed practical nurse who was denied admission to a

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(footnote continued)

The anti-retaliation provision would have ample scope without claims by former employees. For example, current employees often sue for retaliation when subjected to discrimination because of having filed an EEOC complaint. It is no more necessary with respect to Title VII retaliation than it is here to include former employees in order to "provide meaning" to the statute.

While we recognize that retaliation claims may be filed by current employees, we disagree with the dissent's conclusion that "the anti-retaliation provision would have ample scope without claims by former employees." To the contrary, we note that many retaliation claims are filed by former employees alleging, for example, post-employment blacklisting. *See, e.g., Bailey,* 850 F.2d at 1507 (alleging that former employer gave unfavorable reference to prospective employer in retaliation for former employee's having filed sex discrimination suit); *Pantchenko,* 581 F.2d at 1054 (alleging that former employer refused to furnish letters of recommendation in retaliation for former employee's having filed discrimination charges with EEOC); *Rutherford v. American Bank of Commerce,* 565 F.2d 1162, 1163-64 (10th Cir.1977) (alleging that in retaliation for filing sex discrimination charge against former employer, it advised prospective employer of charge).

college's nursing program because of a hearing disability. 442 U.S. at 402, 99 S. Ct. at 2365. In its analysis, the Supreme Court determined that "an otherwise qualified person [under § 504] is one who is able to meet all of a program's requirements [**20] in spite of his handicap." *Id.* at 406, 99 S. Ct. at 2367. Finding plaintiff unable to do so, the Supreme Court denied relief. *Id.* at 414, 99 S. Ct. at 2371.

In an effort to shoehorn Bourgeois into the Supreme Court's definition of "otherwise qualified person" in *Davis,* Appellant and the EEOC attempt to analogize the nursing "program's requirements" in *Davis* with the "requirements" Bourgeois needed to fulfill to participate in the health benefits "program" following his termination. By analogy to § 504, they contend that for Bourgeois to be considered "qualified" under Title I of the ADA, he need not have been a current employee or job applicant "qualified" to perform essential functions of an available job; instead, citing *Davis,* they argue he need only have been "qualified" to meet the "requirements" of the health benefits plan.[15]

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[*1530] While comparing the qualifications necessary for admission to the nursing program in *Davis* to those required for Bourgeois to receive health benefits is like comparing apples to oranges, Appellant draws support for his argument from *Modderno v. King,* 871 F. Supp. 40 (D.D.C.1994), *aff'd,* 317 U.S. App. D.C. 255, 82 F.3d 1059 (D.C.Cir.1996). In *Modderno,* plaintiff brought suit alleging discrimination on the basis of her disability

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[15] Consistent with this argument, the dissent maintains that a former employee seeking fringe benefits may satisfy the QID definition merely by performing such essential functions as "making the appropriate election, paying the premiums, etc." This position completely ignores the legislative history of the ADA discussed herein, which states that the purpose of including the phrase "essential functions" within the QID definition is to "ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in question [sic]." H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 337 (emphases supplied).

in violation of § 504. 871 F. Supp. at 41. The district court determined that "to establish a prime facie case under § 504, a person must be handicapped under the Act, otherwise qualified to receive or participate in the federally supported benefit or program, and excluded from the benefit solely by reason of her or his handicap." *Id.* at 42 (*citing Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 441 (6th Cir.1991)) (emphasis supplied). Although the district court ultimately granted defendant's motion to dismiss upon finding that plaintiff was not denied benefits solely by reason of her handicap, *id.* at 42-43, Appellant argues this Court should nevertheless find Modderno instructive in giving meaning to the phrase "otherwise qualified handicapped [**22] individual" under the Rehabilitation Act.

We decline this invitation. The *Modderno* decision is not binding in this Circuit, and we disagree with the court's holding. What Appellant, the EEOC and the *Modderno* court have done is manipulate the Supreme Court's decision in *Davis* interpreting the phrase "otherwise qualified handicapped individual" under § 504 to essentially create a new job category: a "post-employment benefits recipient." The Eighth Circuit appropriately rejected such an argument in *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938, 108 S. Ct. 1116, 99 L. Ed. 2d 277 (1988). In *Beauford*, plaintiff was unable to perform the essential functions of any available job the employer maintained but claimed she was still protected under § 504 because she was handicapped and eligible for fringe benefits. 831 F.2d at 771-72. In its analysis, the Eighth Circuit considered both the Supreme Court's decision in *Davis*, as well as the federal regulations which define a "qualified handicapped person" under the Rehabilitation Act as the following:

> (1) With respect to employment, a handicapped person [**23] who, with reasonable accommodation, can perform the essential functions of the job in question;....
>
> (4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

45 C.F.R. § 84.3(k).

The Eighth Circuit ruled out subheading (4), upon which plaintiff relied, determining the provision does not apply to discrimination with respect to employee benefits, but rather to discrimination by health, welfare and social services providers toward applicants attempting to obtain such services. *Beauford,* 831 F.2d at 771-72. Finding subheading (1) to be the proper category governing plaintiff's claim, the court concluded that "both the language of the statute and its interpretation by the Supreme Court [in *Davis*] indicate that section 504 was designed to prohibit discrimination within the ambit of an employment relationship in which the employee is potentially able to do the job in question." *Id.* at 771 (emphasis supplied).

We are persuaded by the reasoning of the Eighth Circuit in *Beauford,* finding it consistent with congressional intent underlying Title I of the ADA. Since [**24] Bourgeois was neither a job applicant nor a current employee capable of performing essential functions of an available job with GFF at or subsequent to the time the alleged discriminatory conduct was committed,[16] he was not a QID [*1531] within the meaning of the ADA. Thus, Appellant is not entitled to relief.[17]

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[16] Arguing that Bourgeois was employed at a competing fast food restaurant until shortly before his death, Appellant urges this Court to remand the case for development of the record as to Bourgeois' ability to perform the "essential functions" of his job. We decline to do so. While Bourgeois may indeed have been able to perform the essential functions of a job, including the job he held while previously employed by GFS, he was neither a current employee of nor a job applicant with GFF at or subsequent to the time the alleged discriminatory conduct was committed. Accordingly, we find Bourgeois was not covered under Title I of the ADA.

[17] This opinion should not be read to infer that a former employee has no recourse in the event an employer makes a substantial change in a health insurance benefit plan following discharge. There is simply no cause of action under the ADA.

IV. CONCLUSION

We conclude that Bourgeois, a former employee, was not a "qualified individual with a disability" as defined under the ADA and therefore not entitled to the Act's protection. The district court appropriately denied Appellant's motion for reconsideration of the order of dismissal.

AFFIRMED.

DISSENT BY: ANDERSON

DISSENT: ANDERSON, Circuit Judge, dissenting:

The majority today concludes that Timothy Bourgeois was not a "qualified individual with a disability" under the Americans with Disabilities Act ("ADA" or "the Act"), solely because Bourgeois was a former employee. I respectfully disagree with the majority's conclusion that the ADA provides protection only for currently active employees.

At the outset, it is important to clarify the conduct of the defendant-appellee, Garner Fast Foods, Inc. ("GFF"). The majority correctly notes that GFF discharged Bourgeois in April of 1991 "to avoid paying future health insurance claims" for him. At 2972. The majority fails to mention that GFF took this action, which would clearly be unlawful now that the ADA is in effect, during the two year phase-in that Congress included in the Act, which ran from July 26, 1990, until the July 26, 1992, [**26] effective date. The purpose of this phase-in period was to give employers time to take those actions necessary to come into compliance with the requirements of the Act. Instead of taking action to come into compliance with the ADA, GFF fired Bourgeois and then, because of Bourgeois' continued participation in the company health insurance benefit plan, GFF amended that plan to impose an AIDS cap, all shortly before the July 26, 1992, effective date of the ADA.

Bourgeois seeks to recover reimbursement only for medical expenses incurred from and after the July 26, 1992, effective date of the Act; he does not seek to retroactively recover expenses incurred before that date. In a case in an almost identical posture, this Court held that the continuation of an allegedly discriminatory health insurance policy constitutes a continuing violation, an "ongoing policy actively maintained by" the employer such that "each week in which divorced men are denied insurance coverage . . . constitutes a wrong." *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 798 (11th Cir.1992);

see also Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986).[1]

[**27]

The majority acknowledges that AIDS is a disability under the ADA. They also recognize that fringe benefits like employer-provided health benefits are among the "terms, conditions, and privileges of employment" protected by the Act. At 2974 & nn. 6-7. Thus, employer-provided fringe benefits are subject to the anti-discrimination provisions of the ADA. This far, I agree with the majority. However, the majority then concludes that Bourgeois lost all protection under the ADA when he was fired, thereby assuming the status of a former employee. The crux of the majority's position is that the statutory term "employee" includes only current active employees, and that the statutory term "qualified individual with a disability" does not include a retired employee or other former employee because such persons can no longer perform the essential functions of the positions which they formerly held. For the reasons that follow, I dissent.

Unlike the majority, I cannot conclude that the plain meaning of the language of the statute limits the Act's protection to currently active employees or job applicants, and excludes retirees and other former employees. Quite the contrary, the governing [**28] language of the general statutory provision uses the broader term "individual":

> [*1532] No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

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[1] The majority assumes that the violation alleged here is a continuing violation. At 2973. As noted, this result is dictated by binding precedent.

42 U.S.C. § 12112(a).[2] Moreover, even if the governing general provision had used the term "employees," rather than the term "individual," nothing in the plain meaning of that term limits its scope to current employees as opposed to former employees; this is borne out by the case law discussed below.

Finding no conclusive answer in the plain meaning of the statutory language, I turn for guidance to the structure and evident purpose of the statute, the legislative history, the case law, and the guidance provided by the administrative agency charged with enforcing the statute. The purpose of the statute is expressly stated in the broadest possible terms:

> It is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

42 U.S.C. § 12101(b)(1). In addition to its broad purpose, the statute is clearly a remedial one. The law is well established that remedial statutes are to be construed liberally so as to promote the remedial purposes of the statute. *Pullman-Standard v. Swint,* 456 U.S. 273, 275, 102 S. Ct. 1781, 1783, 72 L. Ed. 2d 66 (1982) (Title VII); *Corning Glass Words v. Brennan,* 417 U.S. 188, 208, 94 S. Ct. 2223, 2234-35, 41 L. Ed. 2d 1 (1974) (Equal Pay Act); *Terrell v. U.S. Pipe & Foundry Co.,* 644 F.2d 1112, 1123 (5th Cir. Unit B 1981) (Civil Rights Act of 1964), *rev'd on other grounds sub nom. Int'l Assoc. of Machinists and Aerospace Workers,* [**30] *AFL-CIO v. Terrell,* 456 U.S. 955, 102 S. Ct. 2028, 72 L. Ed. 2d 479 (1982).

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[2] The majority emphasizes the language of § 12112(b) which sets out a nonexclusive list of actions (or types of action) which constitute discrimination. At 2975. The majority takes comfort in the fact that many of the actions described refer to employees or applicants. Not only is this list expressly nonexclusive, but the focus of the subsection is on the description of actions that constitute discrimination, not on the persons protected by the Act. In any event, not all of the descriptions refer to employees or applicants. *See* § 12112(b)(4) & (6).

Keeping in mind this mandate to liberally construe remedial statutes, I turn to one aspect of the structure of the Act. The majority acknowledges that the protection of the Act extends to fringe benefits provided by employers, such as pension and profit-sharing plans and health benefit plans.[3] It is a matter of common knowledge that fringe benefit plans routinely and commonly cover retirees and other former employees. Indeed, pension and profit-sharing plans are designed primarily for the post-employment years. It is entirely reasonable to infer that Congress intended the Act's protection to extend to those individuals routinely and commonly included within such fringe benefit plans. It would be counter-intuitive, and quite surprising, to suppose (as the majority nevertheless does) that Congress intended to protect current employees' fringe benefits, but intended to then abruptly terminate that protection upon retirement or termination, at precisely the time that those benefits are designed to materialize. The structure of the statute, in clearly extending protection to fringe benefit plans, indicates [**31] that Congress intended protection for those routinely and commonly covered by such employer-provided plans.

The structure of the Act, its legislative history and the interpretive regulations also establish that Congress intended for the ADA to be construed in a manner similar to Title VII. The text of the ADA expressly incorporates the "powers, remedies and procedures set forth in Title VII." 42 U.S.C. § 12117(a). Also, much of the language in the ADA mirrors language found in Title VII. For example, both define the term [*1533] "employee" to mean "an individual employed by an employer."

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[3] Section 12112(a) expressly extends protection to "other terms, conditions, and privileges of employment." The statute also makes several other references indicating that fringe benefits are protected. *See* § 12112(b)(2) & (4). The majority concedes that it is clear that fringe benefits are protected by the ADA, citing the statute, its legislative history, and the interpretive regulations. At 2974 & n. 7.

The House of Representatives [**32] Education and Labor Committee wrote:

> Several of the definitions set out in Title VII of the Civil Rights Act of 1964 are adopted or are incorporated by reference in this legislation—i.e., . . . employer, person . . . the term "employee" means an individual employed by an employer.

H.R.Rep. No. 485(II), 101st Cong., 2d Sess. 54, *reprinted in* 1990 U.S.C.C.A.N. 336.

> The provisions in title I of this bill use or incorporate by reference many of the definitions in title VII of the Civil Rights Act of 1964 (employee, employer . . .).

Id. at 149, *reprinted in* 1990 U.S.C.C.A.N. 432.

> Title I of this legislation incorporates by reference the definition of the term "employer" and "employee" used in title VII of the Civil Rights Act of 1964, . . .

Id. at 76, reprinted in 1990 U.S.C.C.A.N. 359; *see also McDermott International, Inc. v. Wilander,* 498 U.S. 337, 342, 111 S. Ct. 807, 811, 112 L. Ed. 2d 866 (1991) ("In the absence of a contrary indication, we assume that when a statute uses [a term of art], Congress intended it to have its established meaning.").

The EEOC interpretive guidelines also support this view. They state [**33] that, "in general, the term 'employee' has the same meaning that it is given under Title VII.' 29 CFR § 1630.2(a)-(f).[4] Those guidelines note that there are several definitions in Title I of the ADA that are identical, or almost identical, to ones found in Title VII, and that, "these terms are to be given the same meaning under the ADA that they are given under Title VII." *Id.*

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[4] EEOC guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 65, 106 S. Ct. 2399, 2404, 91 L. Ed. 2d 49 (1986).

Based on the similarities between the texts and remedial purposes of the ADA and Title VII, as well as the evidence of congressional intent, courts interpreting the ADA look to Title VII. *See e.g. Carparts Distri. Ctr. v. Automotive Wholesaler's Assoc.*, 37 F.3d 12, 16 (1st Cir.1994) ("In making our determination we [**34] look for guidance to the Civil Rights Act of 1964 ... and cases interpreting that statute."); *West v. Russell Corp.*, 868 F. Supp. 313, 317 (M.D.Ala.1994) (holding that the court will analyze claims of discrimination under the ADA as it would claims under Title VII). This Court should follow this common-sense approach and do so as well.

This Court has construed the term "employee" in the Title VII context to effectuate Congress' purposes in enacting that legislation. In *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir.1988), we held that a former employee had the right to sue his former employer for retaliation under Title VII, despite the language of the statute which referred only to "employees" and "applicants for employment." *Id.* at 1509. We noted that "every other court" had thus held, based upon "a common sense reading in keeping with the purpose of the statute." *Id.*; *see also Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194 (3rd Cir.1994), *cert. denied,* U.S. , 115 S. Ct. 590, 130 L. Ed. 2d 503 (1994); *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir.1993); *Passer v. American Chemical Society,* 290 U.S. App. D.C. 156, 935 F.2d 322 (D.C.Cir.1991); *E.E.O.C.* [**35] *v. J.M. Huber Corp.*, 927 F.2d 1322 (5th Cir.1991) (assuming that former employee can sue under Title VII retaliation provision when employer allegedly retaliates by refusing to pay post-employment profit-sharing benefits); *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052 (2nd Cir.1978); *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir.1977); *but see Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir.1995), *cert. granted,* U.S. , 116 S. Ct. 1541, 134 L. Ed. 2d 645 (1996). We also noted in *Bailey* that the same rationale had been employed in the age discrimination context to extend protection to former employees. *Bailey,* 850 F.2d at 1509 (citing with approval *E.E.O.C. v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir.1987) ("The

term "employee" . . . is interpreted broadly: it includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.")). [*1534] Following this overwhelming case law, we held that "a strict and narrow interpretation of the word "employees" to exclude former employees would undercut the obvious remedial purposes of Title VII." [**36] *Bailey,* 850 F.2d at 1509.

It is significant that Congress enacted the ADA in 1990. Congress is deemed to legislate against the background of the federal common law. *Astoria Fed. S & L Ass'n v. Solimino,* 501 U.S. 104, 108, 111 S. Ct. 2166, 2169-70, 115 L. Ed. 2d 96 (1991). When Congress enacted the ADA in 1990, it was clearly established Title VII case law that the term "employee" includes former employees. Congress is deemed to be familiar with such case law. In the ADA, Congress used the same definition of "employee" that it used in Title VII. The text of the ADA expressly refers to Title VII, and the legislative history clearly indicates a congressional intention to incorporate the established Title VII meaning for the term "employee."

The majority purports to "easily distinguish" *Bailey* and the other retaliation cases. However, the only rationale offered for the distinction, beyond the majority's ipse dixit that retaliation cases are different, is that a broad interpretation of the term "employee" was necessary to provide meaning to anti-retaliation provisions and effectuate congressional intent." At 2977. It is not at all apparent what difference there is between [**37] Title VII anti-retaliation claims and claims by former employees for discrimination with respect to fringe benefits. The anti-retaliation provision would have ample scope without claims by former employees. For example, current employees often sue for retaliation when subjected to discrimination because of having filed an EEOC complaint. It is no more necessary with respect to Title VII retaliation than it is here to include former employees in order to "provide meaning" to the statute. Indeed, the denial of claims of former employees with respect to fringe benefits would seem to intrude more severely on the obvious congressional intent to protect employer-provided fringe benefits. As a

matter of common experience, fringe benefits are designed and provided primarily for the post-employment years. I respectfully submit that the majority's attempted distinction of *Bailey* and the retaliation cases is flawed. *Bailey* is binding precedent, and its rationale should govern this case.[5]

[**38]

The text of the statute also expressly refers to the Rehabilitation Act of 1973, 42 U.S.C. § 12201(a) ("Nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973."). The majority acknowledges that Congress intended the courts to interpret the ADA with reference to the Rehabilitation Act. M/S at 15 (*citing* H.R.REP No. 485(II), 101st Cong., 2d Sess. 23 (1990)). Section 504 of the Rehabilitation Act prohibits discrimination against an "otherwise qualified handicapped individual" in any federally funded program. 29 U.S.C. § 794. Analysis of the cases construing this phrase provides insight into logic behind Congress' use of the nearly identical "qualified individual with a disability."

The Supreme Court has held that "an otherwise qualified person [under § 504] is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis,* 442 U.S. 397, 406, 99 S. Ct. 2361, 2367, 60 L. Ed. 2d 980 (1979). The Court captured the essence of this concept when it wrote:

> Section 504 by its terms does not compel educational institutions to disregard [**39] the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to

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[5] Other non-retaliation Title VII Cases have also extended protection to former employees. *See E.E.O.C. v. South Dakota Wheat Growers Ass'n,* 683 F. Supp. 1302 (D.S.D.1988) (rejecting the argument that Title VII does not cover post-employment health benefits); *see also Long v. State of Florida,* 805 F.2d 1542 (11th Cir.1986), *rev'd on other grounds,* 487 U.S. 223, 108 S. Ct. 2354, 101 L. Ed. 2d 206 (1988) (assuming that former employees have standing under Title VII to challenge discriminatory practices with regard to payments from employee pension plan).

> participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a [*1535] permissible ground for assuming an inability to function in a particular context.

Id. at 405, 99 S. Ct. at 2366 (emphasis added).

The court in *Modderno v. King,* 871 F. Supp. 40 (D.D.C.1994), *aff'd,* 317 U.S. App. D.C. 255, 82 F.3d 1059 (D.C.Cir.1996), addressed a Rehabilitation Act claim of discrimination in the provision of health insurance fringe benefits. The plaintiff, Modderno, was the former spouse of a Foreign Service officer, and qualified for Foreign Service Benefit Plan health insurance on that basis. During the period that she was covered by the Plan, the Plan imposed a lower limit on mental health benefits,[6] as compared to the limit on benefits for physical ailments. *Modderno,* 82 F.3d at 1060. Although the court did not find that this limit amounted to discrimination in violation of § 504, [**40] it nonetheless implicitly recognized that a plan participant could assert a claim of discrimination in the provision of fringe benefits. The Modderno district court wrote that,

> To establish a prima facie case under § 504, a person must be handicapped under the Act, otherwise qualified to receive or participate in the federally supported benefit or program, and to be excluded from the benefit solely by reason of her or his handicap.

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[6] The Plan was changed to include a $75,000 lifetime maximum for mental health benefits.

Moddemo, 871 F. Supp. at 42 (*citing Pesterfield v. Tennessee Valley Authority,* 941 F.2d 437, 441 (6th Cir.1991) (emphasis added)).[7]

Finally, my position that retirees and other former employees are protected under the ADA is supported by a common sense reading of the statute. As noted above, § 12111(8) provides that a "qualified individual with a disability" means "an individual with a disability who . . . can perform the essential functions of the employment position . . . ." A retired or former employee, like Bourgeois, has already performed all of the functions expected of hinm with respect to the job be occupied before retirement. Under the Company's plan, the only additional "functions" expected of Bourgeois, and other retired or former employees, are to make the appropriate election, pay the premiums, etc. Fringe benefits, such as the one at issue here, are all part of the overall compensation package provided for employees as consideration for their service during their active years with the company. Post-employment benefits are like deferred compensation, and are expected to be enjoyed during the post-employment years. The common sense of the concept, "qualified individual with a disability," is that there should be no discrimination because of stereotypes or stigmas. Differences in treatment are legitimate [**42] when based on the ability of a person to perform the functions expected in the position. In other words, the protections of the Act accrue to disabled persons who can perform the functions expected to be performed by persons without disability is the same position. As the Supreme Court put

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[7] The Eighth Circuit, in *Beauford v. Father Flanagan's Boys' Home,* 831 F. 2d 768 (8th Cir.1987), employed a rationale very similar to that of the majority in this case. The opinion makes no reference to the overwhelming Title VII case law discussed above. I respectfully submit that Beauford, like the majority opinion in this case, ignored not only that overwhelming case law, which constitutes the background against which Congress legislated, but also ignored the obvious common sense construction of the statute in light of its purpose and legislative history. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 241, 109 S. Ct. 1775, 1786, 104 L. Ed. 2d 268 (1989) ("We need not leave our common sense at the doorstep when we interpret a statute.").

it in *Southeastern Community College v. Davis*: "Mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." 442 U.S. at 405, 99 S. Ct at 2366 (emphasis added). Applying that common sense in the instant context, it is obvious that retirees and other former employees, who because of their prior employment are entitled to participate in post-employment fringe benefit plans, are not expected to perform the functions of the jobs they previously held before retirement. Rather, they are expected to meet whatever criteria are mandated by the fringe benefit plan for the accrual and continuation of coverage, including, for example, any required minimum years of employment, honorable discharge, and the payment of premiums.

[*1536] In summary, I respectfully submit the the majority sees "plain meaning" when there is none. The majority ignores the [**43] common sense reading of the statute and the evident congressional purpose as revealed in the structure of the statute, its legislative history, and the overwhelming case law which provided the background against which Congress legislated.[8] Because I cannot agree with the majority's conclusions, I respectfully dissent.

[**44]

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[8] I have found very few ADA cases squarely addressing the issue before us. A district court in the Norther District of Illinois rejected as unpersuasive and without case law support an argument that the employment provisions of the ADA do not apply to former employees. *Northern v. City of Chicago*, 841 F. Supp. 234, 236 (N.D.Ill.1993). However, *Parker v. Metropolitan Life Ins. Co.*, 875 F. Supp. 1321 (W.D. Tenn.1995), appeal docketed, No. 95-5269 (6th Cir.1995), followed *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir.1987), and held that a former employee was not a qualified individual with a disability, and thus could not make an ADA claim under the employer's disability plan. The Parker court based this holding on its conclusion that the employee had become totally disabled and was no longer able to perform the essential functions of the job she had previously held. In my judgment, *Parker*, like *Beauford*, is flawed. It failed to address the overwhelming Title VII case law which provided the background against which Congress enacted the ADA, and failed to address the common sense construction of the Act in light of its purpose and legislative history.

AUGUST GONZALES,
ad Administrator of the Estate of Timothy Bourgeois, Deceased, Plaintiff,
v.
GARNER FOOD SERVICES, INC., et al., Defendants.
CIVIL ACTION NO. 1:93-CV-1639-JDF

United States District Court for the Northern District of Georgia, Atlanta Division

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855 F. SUPP. 371; 1994 U.S. DIST. LEXIS 7827
March 17, 1994, Decided
March 17, 1994, Filed

COUNSEL: [**1] For Plaintiff: Sharon Nelson Hill-Milton Dale Roman, Atlanta Legal Aid society, Atlanta, GA.

For Defendants: Eric Brandt Reuss, Atlanta, GA.

JUDGES: Forrester

OPINIONBY: J. OWEN FORRESTER

OPINION: [*372] ORDER

This matter is before the court on Defendants Garner Food Services, Inc., and Garner Fast Foods, Inc.'s motion to dismiss.[1] Plaintiff Augustus Gonzales, as administrator of the estate of Timothy Bourgeois, filed suit on July 20, 1993, alleging violations of the Employment Retirement Income Security Act (ERISA) and the Americans with Disabilities Act (ADA).

When reviewing a motion to dismiss, a court must take the material allegations of the complaint and its incorporated exhibits as true and liberally construe them in favor of the plaintiff.

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[1] Defendants Willis Corroon Administrative Services Corporation and Willis Corroon Corporation of Georgia also were named in this suit and moved to dismiss. Plaintiff, however, voluntarily dismissed these defendants without prejudice under Fed. R. Civ. P. 41(a)(1)(i) on September 7, 1993.

Fed. (**2) R. Civ. P. 12(b)(6), 10(c) and 8(f); *Walker Process Equipment v. Food Machinery and Chemical Corp.*, 362 U.S. 172, 174-75, 15 L. Ed. 2d 247, B6 S. Ct. 347 (1965); *Conley v. Gibson*, 355 U.S. 41, 2 L. Ed. 2d 80, 76 S. Ct. 99 (1957). Dismissal is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46.

I. ALLEGED FACTS

Timothy Bourgeois was employed at Hardee's Restaurants, owned and operated by Garner Food Services (GFS), until April of 1991. GFS employed twenty-five or more employees for each working day in each of the twenty or more calendar weeks in 1990 or 1991. GFS also sponsored and administered a group welfare benefit plan in which Mr. Bourgeois participated by virtue of his employment. The benefit plan provided health insurance coverage up to a $1 million lifetime limit.

In February of 1990, while still an employee of GFS, Mr. Bourgeois was diagnosed as having AIDS. As a result of [**3] his condition, he sought and received medical treatment and submitted claims for health insurance coverage. As the sponsor and administrator of the plan, GFS corporate officials learned of his condition. As alleged, GFS then discharged Mr. Bourgeois because he had contracted AIDS and to avoid paying his future health insurance claims. Thereafter, Mr. Bourgeois elected and paid the necessary premiums to continue his health insurance benefit coverage.[2]

At least partly because of his continued participation in the health insurance benefit plan after his termination, GFS or its successor in interest, Garner Fast Foods, Inc. (GFF), amended the plan on October 1, 1991, to limit AIDS-related [**4] treatment to $10,000 annually with a lifetime maximum limit of $40,000 (AIDS cap amendment). All other physical ailments

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[2] The Comprehensive Omnibus Budget Reconciliation Act of 1976 (COBRA) amended the Employment Retirement Income Security Act of 1974 to require employers to allow former employees to elect to continue coverage under the employer's group health insurance plan for up to eighteen months. 29 U.S.C. § 1161.

continued to be covered under the plan up to the lifetime maximum of $1 million with no annual limit. Either prior [*373] to this amendment to the plan or shortly thereafter, GFF became the sponsor of Mr. Bourgeois' benefit plan.

Mr. Bourgeois at some point exhausted the benefits available to him under the AIDS cap limit. Thereafter, Defendants refused to pay claims submitted in excess which now total approximately $90,000. On August 27, 1992, Mr. Bourgeois filed a charge with the EEOC alleging that the AIDS cap amendment violated the anti-discrimination provisions of the ADA. On September 6, 1992, Mr. Bourgeois died. His estate assumed the medical debts, and on December 11, 1992, August Gonzales was appointed the administrator of the estate. The EEOC was notified that Mr. Gonzales should be substituted as the charging party. On April 21, 1993, Mr. Gonzales received a notice of right to sue letter from the EEOC.

II. DISCUSSION

The complaint sounds in two counts. Plaintiff first alleges that Defendants discharged Mr. Bourgeois "because he had made AIDS related claims [**5] under the GFS plan and for the purpose of limiting his right to continue making such claims under the plan," in violation of section 510 of ERISA, 29 U.S.C. § 1140. Second, Plaintiff alleges that Defendants' adoption of the AIDS cap amendment discriminated against Mr. Bourgeois on account of his disability in violation of section 102 of Title 1 of the ADA, 42 U.S.C. § 12112.[3] Defendants move to dismiss count two on a number of grounds. For reasons shown below, however, this court grants the motion to dismiss on another ground.

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[3] Defendants have also moved to dismiss a claim that the AIDS Cap Amendment to the health insurance benefit plan was discriminatory conduct designed to interfere with the exercise or attainment of any right under ERISA, Z9U.S.C. @1140. They argue that such a claim is meritless in light of *Owens v. Storehouse, Inc.*, 984 F. 2d 394, 398-400 (11th Circ. 1993) (affirming this court's holding, 773 F. Supp. 416, 410-20 (N.D. Ga. 1991)). This assertion is correct about a showing of a contractual right found in the benefit plan or evidence of the employer's specific intent to discriminate against the employee. Plaintiff acknowledges this authority and responds that he has not sought to plead such a claim.

A. Retroactivity and a Continuing Violation

The amendment to the health insurance benefit plan, which imposed the AIDS cap, was made on October 1, 1991. The ADA as applied in Title 1 to private employers is not retroactive. The Act was enacted on July 26, 1990. 1990 U.S.C.C.A.N. 600-01. Section 108 of the Act as enacted provides that Title I "shall become effective twenty-four months after the date of enactment," in other words July 26, 1992.[4] Courts have uniformly construed this provision to mean that Title 1 applies only to wrongful conduct occurring after that date. *O'Bryants v. City of Midland,* 9 F. 3d 421, 422 (5th Cir. 1993); *Aramburn v. Boeing Co.,* 1993 WL 544567 2-3 (D. Kan. December 29, 1993) (citing other district court cases uniformly holding Title 1 as prospective only); *Verdon v. Consolidated Rail Corp.,* 828 F. Supp. 1129, 1140-41 (S.D.N.Y. 1993); *see also* 1990 U.S.C.C.A.N. 602 (signing statement of President Bush stating; "these phase in periods and effective dates will permit adequate time for businesses to become acquainted with the ADA's requirement and to take the necessary steps to [**7] achieve compliance."). Plaintiff's claim based on any acts prior to July 26, 1992, therefore, are barred.

Plaintiff, however, has argued that the AIDS cap continued in effect after the effective date and that the continued denial of access to health care benefits after July 26, 1992, until his death on September 6, 1992, are continuing violations and therefore are not time-barred. In determining whether the AIDS cap amendment constitutes a continuing violation, this court must distinguish between the "present consequences of a one-time violation," which would not qualify as [*379] continuing violations, and "continuation [**8] of violations into the present," which would. *Beavers v. American Cast Iron Pipe Co.,* 975 F.2d 792. (11th Cir. 1992) (*quoting Webb v. Indiana National Bank,* 931 F.2d 434, 438 (7th Circ. 1991)). Were this issue determinative, this court would likely find the continued denial of benefits by Defendants under this policy amendment a continuing violation.

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[4] From July 26, 1992 until July 26, 1994, Title 1 of the Act only applies to employers engaged in an industry affecting commerce who have twenty-five or more employees for each working day for each of twenty or more calendar weeks in the current or preceding calendar year. Thereafter, only fifteen or more employees for each working day are required. 42 U.S.C. @ 12111(5)(A).

Because this issue is not determinative, however, this court will only assume for purposes of discussion a continuing violation for the denial of benefits after july 26, 1992.

B. Qualified Individual

Plaintiff seeks to recover under Title 1 of the ADA which prohibits discrimination in the employment context. The general rule provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 12 U.S.C. @12112(a). A "qualified individual with a disability" is defined as "an individual [**9] with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that each individual holds or desires." 42 U.S.C. @ 12111(a).

This court assumes that due to Mr. Bourgeois' right to elect continued coverage under Defendants' benefits plan when he lost coverage as a result of a "qualified event," his discharge falls within the meaning of "other terms, conditions and privileges of employment," 42 U.S.C. @12111; see also 29 U.S.C. @@ 1161(a), 1163(2).[5] The problem with Plaintiff's second claim as alleged, however, is that at the time the AIDS cap amendment was adopted, Mr. Bourgeois was not an employee of defendants. In other words, be neither held nor sought to hold a particular position. Rather, he was only a participant and beneficiary by virtue of his stature as a former employee.

The legislative history of the ADA makes clear that the definition of a "qualified individual with a disability" is directed towards job applicants and employees. 1990 U.S.C.C.A.N. at

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[5] It is also undisputed that AIDS is a disability within this meaning of the ADA. 28 C.R.R. @@ 35.104(1)(b)(11) & 36.104(11(B)(ii); *United States v. Morvant*, 843 F. Supp. 1092, 1994 WL 43366 *1 (E.D. La. Jan. 26, 1994); *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993).

337, 432 & 456.[6] One could argue that Mr. Bourgeois still desired the position after he was discharged, thus falling within the definition of a qualified individual with a disability. Such a construction, however, would be problematical. For instance, use of the word desire outside the job applicant or job promotion context would allow an act of discharge to be turned into a "continuing violation" by virtue of the Plaintiff's continued "desire" for the position. Such a reading would run counter to Title VII and ADEA precedent which holds that a failure to rehire and simple request to be rehired cannot resurrect a simple discharge claim under the 180-day filing requirement for the EEOC. *See Burnam v. Amoco Container Co.*, 755 F.2d 893, 894 (11th Cir. 1985). This court, therefore, holds that because Mr. Bourgeois was not a job applicant or an employee at the time of the alleged violations, be cannot prevail on his claim of discrimination as a matter of law. His claim under [**11] ERISA, however, still remains.[7]

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[6] This language is not found in other discrimination statutes but was specifically adopted in this bill to "ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e.. the non-marginal functions of the job in question." U.S.C.C.A.N. at 337

[7] Of course, absent the effective c[illegible]blem for Plaintiff, he would certainly have pled a claim for discrim[illegible] discharge under ADA. The fact that this claim is foreclosed in this case is the normal consequence of new legislatively-created causes of action.

III. CONCLUSION

In light of the foregoing discussion, this court finds as follows: Defendants Garner Food Services, Inc., and Garner Fast Foods, Inc.'s motion to dismiss is GRANTED (5-1, 5-2) as to count two of the complaint. Plaintiff August Gonzales', as administrator of the estate of Timothy Bourgeois, motion to file. [*375] corrected pleading is GRANTED (11-1) and was considered. The [**12] Clerk of Court is DIRECTED to DISMISS COUNT TWO of the complaint in this action.

SO ORDERED, this 17th day of March, 1994.

J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

95-8533

United States Court of Appeals for the Eleventh Circuit

DECEMBER 12, 1996, DECIDED

THOMAS

v.

GARNER FOOD SERVICES, INC.,

PRIOR HISTORY: (#) Citation of Panel Decision: N.D.Ga., 89 F.3d 1523.

Original Opinion of August 2, 1996. Reported at: 1996 U.S. App. LEXIS 19012.

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): Sharon Nelson Hill, Milton Dale Roman, "Chip", KOVAL & ROWAN, P.C., Atlanta, GA. Sharon N. Hill, TROUTMAN SANDERS LLP, Atlanta, GA.

AMICI CURIAE for Am. Civil Liberties: Cary LaChewn, Edward Copeland, NY Lawyers for the Public Interest, Inc., New York, NY.

AMICI for Am. Assoc. Retired Persons: Cathy Ventrell-Monsens, Sally Dunaway, Washington, DC.

AMICI for Am. Medical Assoc.: Catherine A. Hanseens, Lambda Legal Defense & Education Fund, Inc., New York, NY.

AMICI for EEOC: Carolyn L. Wheeler, C. Gregory Stewart, Gwendolyn Young Reams, Mary L. Clark, Ofc. of Gen. Cael, Washington, DC.

ATTORNEY(S) FOR APPELLEE(S): GARNER: Eric Brendt Reuss, Ofc. of Eric Brandt Reuse, Atlanta, GA. WILLIS CORROON: J. Robert Persons, III, Gregory A. Gunter, Lord, Bissell & Brook, Atlanta, GA.

OPINION: Suggestion for Rehearing *En Banc* Denied.

No. 95-8533

IN THE

United States Court of Appeals for the Eleventh Circuit

AUGUST GONZALES,

Plaintiff-Appellant,

v.

GARNER FAST FOODS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE*

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ["Commission"] is the agency charged by Congress with the interpretation, administration, and enforcement of Title I of the Americans with Disabilities Act ["ADA"], 42 U.S.C. § 12101 *et seq.* (Supp. V 1993). This appeal raises important questions concerning a former employee's right to challenge benefits discrimination in an insurance plan adopted before the effective date of the ADA. Because the resolution of these questions has significant implications for the effective enforcement of the ADA, the Commission offers its views to the Court.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this ADA claim under 28 U.S.C. § 1331 (1988) and 42 U.S.C. § 12117(a). The district court entered final judgment for the defendant on March

31, 1995 and docketed the judgment on April 1, 1995. (R. 26, Judgment) The plaintiff filed a timely notice of appeal on April 28, 1995. *See* Fed. R. App. P. 4(a) (West 1994). (R. 27, Notice of Appeal) This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 (1988).

STATEMENT OF THE ISSUES[1]

1. Whether a plaintiff can state a timely ADA claim under a continuing violation theory where an employer has maintained its pre-ADA AIDS cap beyond the ADA's effective date.

2. Whether the district court erred as a matter of law in holding that a former employee cannot state an ADA claim challenging an employer's discrimination in health insurance benefits.

STATEMENT OF THE CASE

This is an appeal from a final judgment in an ADA action entered in favor of the defendant employer on March 31, 1995.

A. Proceedings Below

August Gonzales filed this ADA action on July 20, 1993, alleging that Garner Food Services, Inc., and its successor-in-interest, Garner Fast Foods, Inc., ["Garner"], discriminated against Timothy Bourgeois on the basis of his disability, AIDS, by amending its health benefits plan to limit insurance coverage of AIDS-related benefits to $10,000 per year with a $40,000 lifetime maximum, while maintaining its $1,000,000 lifetime maximum for all other health conditions with no annual limits. (R. 1, Complaint) Gonzales seeks compensatory and punitive damages, attorneys' fees, and costs. *Id.* Garner moved to dismiss Gonzales' ADA claim on August 25, 1993. (R. 5, Motion to Dismiss) The district court granted Garner's motion to dismiss on March 17, 1994, holding that a former employee is not covered by the ADA. (R. 12, Order) The court denied Gonzales' motion for reconsideration of the dismissal order on March 30,

[1] The Commission takes no position on any other issue raised in this appeal.

1995. (R. 25, Order) The court entered final judgment for Garner on March 31, 1995. (R. 26, Judgment) Gonzales filed a timely notice of appeal on April 28, 1995. (R. 27, Notice of Appeal)

B. Statement of Facts

Timothy Bourgeois was employed as an assistant manager at Hardee's Restaurants, owned and operated by Garner Food Services, Inc., until April 9, 1991. (R. 22, Amended Complaint at ¶ 19)[2] Bourgeois participated in Garner's self-funded group health benefits plan, which provided health insurance coverage up to a $1,000,000 lifetime maximum with no annual limits. *Id.* at §§ 21-24. Bourgeois was diagnosed with HIV/AIDS in February 1990. *Id.* at § 25. Because Garner sponsored and administered its health benefits plan, Garner officials learned that Bourgeois had AIDS from his claim forms. *Id.* at ¶¶ 26-27. Garner fired Bourgeois on April 9, 1991. *Id.* at ¶ 19.

Following his termination, Bourgeois elected to continue his health insurance coverage under Garner's plan in accordance with the Comprehensive Omnibus Budget Reconciliation Act of 1986 ["COBRA"], 29 U.S.C. § 1161 *et seq.*(1988).[3] (R. 22, Amended Complaint at ¶ 28) Bourgeois made the monthly premium payments required to receive ongoing health insurance coverage under COBRA. *Id.* at ¶ 29. Garner amended its health benefits plan on October 1, 1991 to limit insurance benefits for AIDS-related claims to $10,000 per year with a $40,000 lifetime maximum. *Id.* at ¶ 30. Garner retained its $1,000,000 lifetime benefits cap for all other physical conditions with no annual limits. *Id.* at ¶ 31. Bourgeois exhausted the coverage available to

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[2] The statement of facts is drawn from plaintiff's amended complaint. Because the district court decided this case on a motion to dismiss, the allegations in plaintiff's complaint must be liberally construed and taken as true. Fed. R. Civ. P. 8(f) & 12(b)(6) (West 1994). *See Conley v. Gibson*, 335 U.S. 41, 45-48 (1957); *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992).

[3] COBRA amended the Employment Retirement Income Security Act of 1974 ["ERISA"], 29 U.S.C. 1001 *et seq.* (1988), to require employers to allow former employees to continue their health insurance coverage under their employer's plan for up to eighteen months following a qualifying event, such as termination. 29 U.S.C. 1161-63.

him under Garner's health benefits plan. *Id.* at ¶ 42. Garner thus refused to pay Bourgeois' claims totalling approximately $90,000 for the period from July 26, 1992 to September 6, 1992 that exceeded the AIDS cap. *Id.* at ¶¶ 43-44.

The ADA, enacted on July 26, 1990, Pub.L. 101-336, 104 Stat. 327 (1990), took effect on July 26, 1992. 42 U.S.C. § 12111 N. Garner maintained its AIDS cap on and after the ADA's effective date. (R. 22, Amended Complaint at ¶ 41) One month later, on August 27, 1992, Bourgeois filed a charge with the Commission, alleging that Garner's AIDS cap constituted disability discrimination in violation of the ADA. *Id.* at ¶ 45. Following Bourgeois' death on September 6, 1992, August Gonzales [hereinafter "plaintiff"] was appointed administrator of Bourgeois' estate, which assumed Bourgeois' medical debts. *Id.* at ¶¶ 6, 44, 46. After receiving a right-to-sue letter, plaintiff filed this action on July 20, 1993. *Id.* at ¶ 47; R. 1, Complaint. In Count II of his original complaint, plaintiff alleged that Garner discriminated against Bourgeois on the basis of his disability in violation of section 102 of the ADA, 42 U.S.C. § 12112, by capping insurance coverage for AIDS-related claims at a lower level than for all other conditions. (R. 1, Complaint) Garner moved to dismiss plaintiff's ADA claim on August 25, 1993. (R. 5, Motion)

C. District Court Decisions

The district court granted Garner's motion to dismiss plaintiff's ADA claim on March 17, 1994, holding that former employees are not covered by the ADA. *Gonzales v. Garner Food Services, Inc., et al.*, 855 F. Supp. 371, 374 (N.D. Ga. 1994). In light of Garner's October 1, 1991 adoption of the AIDS cap and the ADA's July 26, 1992 effective date, the court initially observed, "Plaintiff's claim based on any acts prior to July 26, 1992, therefore, are barred." *Id.* at 373. The court assumed, however, that because Garner maintained its AIDS cap beyond the ADA's effective date, plaintiff could state a continuing violation. *Id.* at 374. The court stated:

> Were this issue determinative, this court would likely find the continued denial of benefits by Defendants under this policy amendment a continuing violation. Because this issue is not determinative, however, this

> court will only assume for purposes of discussion a continuing violation for the denial of benefits after July 26, 1992.

Id.

The court then concluded that plaintiff's ADA claim is barred because Bourgeois was neither an employee of, nor an applicant for employment with, Garner at the time that it capped its AIDS benefits. 855 F. Supp. at 374. Instead, Bourgeois "was only a participant and beneficiary by virtue of his status as a former employee." *Id.* As a former employee, Bourgeois was not a qualified individual with a disability protected by the ADA. *Id.* The court stated, "The legislative history of the ADA makes clear that the definition of a 'qualified individual with a disability' is directed toward job applicants and employees." *Id.* (citing 1990 U.S.C.C.A.N. at 337, 432 & 456). The court noted that the legislative history states that employers " 'can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in question.' " *Id.* at 374 n.6 (quoting 1990 U.S.C.C.A.N. at 337). Accordingly, the court dismissed plaintiff's ADA claim. *Id.* at 374.

The district court denied plaintiff's motion for reconsideration of the dismissal order on March 30, 1995, stating, "Neither has Plaintiff cited to nor has the court found any authority, binding or otherwise, that protects former employees terminated prior to the effective date of the ADA or other analogous act." (R. 25, Order Denying Motion for Reconsideration at 4)

D. Statement of the Standard of Review

In reviewing the district court's order granting defendant's motion to dismiss, the allegations in plaintiff's amended complaint must be "taken as true and read in the light most favorable to the plaintiff[ ]." *Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992); *see also* Fed. R. Civ. P. 8(f) & 12(b)(6) (West 1994); *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957). This Court has held that "[a] complaint may not be dismissed unless the plaintiff can prove no set of facts which would entitle him to relief." *Linder*, 963 F.2d at 334. Whether the district court applied the correct

legal standards in dismissing plaintiff's complaint is reviewed *de novo*. *Id.*

SUMMARY OF ARGUMENT

The district court correctly assumed, and this Court should explicitly hold, that plaintiff can state a continuing violation because defendant maintained its pre-ADA AIDS cap beyond the ADA's effective date, thereby rendering plaintiff's ADA claim timely. Where defendant maintains an ongoing discriminatory policy, even one that is adopted prior to the effective date of the law prohibiting such policy, plaintiff can state a timely claim under the continuing violation theory as long as at least one application of the discriminatory policy occurs in the statute of limitations period. *Bazemore v. Friday*, 478 U.S. 385, 395 (1986) ("A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date").

The district court erred as a matter of law, however, in concluding that former employees are not protected by the ADA. The court erred in reasoning that only current employees and applicants satisfy the ADA's definition of a qualified individual with a disability. Because Bourgeois was qualified for the employment position that he held—that of post-employment benefits recipient—plaintiff can challenge Garner's disability-based discrimination in the provision of such benefits.

ARGUMENT

I. A PLAINTIFF CAN STATE A TIMELY ADA CLAIM UNDER A CONTINUING VIOLATION THEORY WHERE AN EMPLOYER HAS MAINTAINED ITS PRE-ADA AIDS CAP BEYOND THE ADA'S EFFECTIVE DATE.

The district court assumed that plaintiff could state a continuing violation because Garner's pre-ADA adoption of the AIDS cap continued in effect beyond the ADA's effective date. The court's assumption was correct and this Court should explicitly so hold.

This case tests whether the ADA applies to provisions in an employer's health benefits plan that were adopted before the ADA's effective date but that continue in effect after the ADA's effective date. Specifically, assuming that it would now be illegal for an employer to cap AIDS-related benefits,[4] the issue is whether it is also illegal for an employer to maintain a cap on AIDS benefits that is adopted before the ADA prohibited such conduct. The law is settled that the maintenance of a discriminatory policy adopted pre-Act or outside the relevant limitations period is a violation under a continuing violation theory.[5] For example, in *Bazemore v. Friday*, 478 U.S. 385, 395 (1986), the Supreme Court explained the circumstances in which originally legal conduct can become illegal following a change in

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[4] The district court did not question that this facially discriminatory benefits policy would state a valid ADA claim if adopted today. The Commission has stated that an employer violates ADA sections 102(a), 42 U.S.C. § 12112(a), and 102(b)(1), 42 U.S.C. § 12112(b)(1), when it singles out one illness, such as AIDS, for a cap on benefits under its self-insured health plan absent proof that its health insurance plan is bona fide and is not a subterfuge to evade the purposes of the ADA. "EEOC Interim Guidance on Application of ADA to Health Insurance" in EEOC Compl. Man. (BNA) (1993) at N:2302, N:2304 (instructing, "disability-based insurance plan distinctions are permitted only if they are within the protective ambit of section 501(c) of the ADA," 42 U.S.C. 12201(c), and defining "disability-based insurance plan distinctions" as "[a] term or provision . . . [that] singles out a particular disability" such as AIDS). *See also* Interpretive Guidance on Title I of the ADA 1630.16(f), 29 C.F.R. Part 1630, App. (1994) (limited exemption for health insurance plan that is bona fide and is not a subterfuge to evade ADA's purposes).

[5] The Commission has also stated, "[T]he ADA does not provide a 'safe harbor' for health insurance plans that were adopted prior to its July 26, 1990 enactment." "EEOC Interim Guidance on Application of ADA to Health Insurance" in EEOC Compl. Man. at N:2305. In so stating, the Commission relied upon the Senate Report, contained in the ADA's legislative history, which instructs that whether a health insurance plan is a subterfuge to evade the ADA's purposes should be determined "regardless of the date the insurance plan . . . was adopted." S. Rep. No. 116, 100st Cong., 1st Sess. 85 (1989). *See also* H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 136-38 (1990) use Labor Report], *reprinted in* 1990 U.S.C.C.A.N. 303, 419-21 (same); H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 71 (1990) use Judiciary Report], *reprinted in* 1990 U.S.C.C.A.N. 445, 494 ("Section 501(c) may not . . . be used as a subterfuge to evade the requirements of this Act pertaining to employment . . . regardless of the date an insurance . . . plan was adopted.").

the law. *Bazemore* involved a public employer that, prior to Title VII's applicability to public employers, segregated its white and black employees into two divisions and paid the white employees more. *Id.* at 390-91. When Title VII became applicable, the employer merged the two divisions, but retained the pay disparity. *Id.* The employer argued that because the disparity had originated before Title VII applied, it was not a violation of Title VII. The Supreme Court rejected this argument. Id., at 395. Holding that the perpetuation of the pay disparity constituted a continuing violation, the Court observed, "A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, it is liable under that statute." *Id.* The Court emphasized that it was the active maintenance of the prohibited race-based policy that made the pay discrimination a continuing violation, stating, "Each week's paycheck that delivers less to a black than a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." *Id.* at 395-96.

This Court too has found a continuing violation where the employer maintained a discriminatory policy. *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 797-98 (11th Cir.1992). Because the employer "actively maintained" a policy of denying medical and dental insurance coverage to the nonresident children of employees, this Court held, "each week in which divorced men are denied insurance coverage for their nonresident children while similarly situated divorced women, who are apparently far more likely to have custody of their children, receive such coverage constitutes a wrong arguably actionable under Title VII." *Id.* at 798. *See also Knight v. Columbus*, 19 F.3d 579, 581-83 (11th Cir.) (ongoing failure to pay overtime pursuant to job classification system constitutes continuing violation under Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* (1988)), *cert. denied*, 115 S. Ct. 318 (1994); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993) (finding continuing violation where employer paid black employee less than white predecessor "not only on the day that it offered her less than her white predecessor but also on

every day of her employment."); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980) (holding, "Where an employee charges an employer with continuously maintaining an illegal employment practice, he may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice," and remanding for "a determination of whether Gonzalez can establish a continuing violation of Title VII by Firestone" in the use of its testing system to select employees for certain job opportunities).[6]

In this case, Garner's policy of capping AIDS benefits clearly constitutes a continuing violation. Garner amended its health benefits plan prior to the ADA's effective date to place yearly and lifetime caps on AIDS-related benefits, while retaining its $1,000,000 lifetime limit for all other health conditions. Garner continued to apply its AIDS cap even after the ADA's effective date. Plaintiff's allegation that Garner perpetuated a facially discriminatory policy states a continuing violation. *See Baxemore*, 478 U.S. at 395. Accordingly, Garner committed an actionable wrong each day that it denied health insurance coverage for Bourgeois' AIDS-related benefits claims over $10,000 per year and $40,000 as a lifetime maximum while continuing to cover all other health conditions up to a $1,000,000 lifetime maximum with no annual limits. *See Beavers*, 975 F.2d at 798.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN HOLDING THAT A FORMER EMPLOYEE CANNOT STATE AN ADA CLAIM CHALLENGING AN EMPLOYER'S DISCRIMINATION IN HEALTH INSURANCE BENEFITS.

The district court erred as a matter of law in concluding that Gonzales' ADA claim is barred because a former employee is not covered by the ADA. Title I of the ADA prohibits "discrimina[tion] against a qualified individual with a disability

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[6] Decisions of the former Fifth Circuit rendered before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

because of the disability . . . in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The statute defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court believed that this definition is directed only toward current employees and applicants and that former employees thus cannot challenge otherwise prohibited discrimination. The district court's restrictive reading of the coverage provision conflicts with the language and remedial purposes of the ADA, and with the authoritative construction of similar language in other employment discrimination statutes.

It is clear that the ADA expressly prohibits discrimination in the provision of fringe benefits. 42 U.S.C. 12112(b)(2); *see also* 29 C.F.R. § 1630.4(f) (it is unlawful for an employer to discriminate on the basis of disability in the provision of "[f]ringe benefits available by virtue of employment"); H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 59 (1990) [House Labor Report], *reprinted in* 1990 U.S.C.C.A.N. 303, 341 ("[E]mployers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability."). The Commission has stated that the ADA's prohibition on "limiting, segregating, or classifying" individuals with disabilities in the context of health insurance "is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees." Interpretive Guidance on Title I of the ADA 1630.5, 29 C.F.R. Part 1630, App. (1994). *See also* S. Rep. No. 116, 101st Cong., 1st Sess. 28-29 (1989) ("All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees."); H.R. Rep. No. 485(II) at 58-59, *reprinted in* 1990 U.S.C.C.A.N. at 340-41 (same); H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 36 (1990) [House Judiciary Report], *reprinted in* 1990 U.S.C.C.A.N. 445, 459 ("[A]n employer could not adopt [ ] different . . . benefits . . . for employees with disabilities."). Therefore, once an employer chooses to offer health insurance as a type of fringe benefit, the employer must comply with Title I of the ADA by providing the health insurance benefits in a nondiscriminatory manner. *Cf. Hishon v. King &*

Spalding, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion . . . "). Thus, once Garner chose to offer a self-funded group health plan, and Bourgeois elected to continue his coverage under Garner's plan pursuant to COBRA following termination of his employment, Garner was obligated to provide health insurance in a nondiscriminatory manner.

The ADA prohibits discrimination in the provision of health insurance against a "qualified individual with a disability." 42 U.S.C. § 12112(a). Since a "qualified individual with a disability" is one who is able to "perform the essential functions of the *employment position* that such individual holds or desires," 42 U.S.C. § 12111(8) (emphasis added), the district court assumed that Bourgeois must be currently employed by, or seeking employment with, Garner to be covered by the statute. *Gonzales*, 855 F. Supp. at 374. However, in a case challenging the provision of post-employment benefits, the plaintiff's status as an employee or applicant is irrelevant to the qualified individual with a disability analysis.

A plaintiff must simply show that he is qualified for the "employment position" that he holds or desires. An employment position, as used in section 101's definition of a "qualified individual with a disability," 42 U.S.C. § 12111(8), is not necessarily the same thing as a job. Where, as here, a former employee challenges discrimination in the provision of post-employment benefits, he must demonstrate that he is qualified for the *employment position* that he holds—that of "post-employment benefits-recipient." Therefore, so long as Bourgeois satisfied all nondiscriminatory eligibility criteria for the continued receipt of health insurance benefits, he is a "qualified individual with a disability" within the meaning of the ADA. Garner does not dispute that Bourgeois had a disability, that he enrolled in Garner's health benefits plan, that he satisfied the eligibility criteria for the receipt of health benefits, and that he continued his enrollment

pursuant to COBRA following his termination.[7] Because Bourgeois was qualified to receive benefits arising from his employment relationship with Garner as of the ADA's effective date, he is a "qualified individual with a disability" who has been deprived of health insurance coverage "because of [his] disability" in violation of the ADA. 42 U.S.C. § 12112(a).

As discussed above, the ADA language referring to coverage of qualified individuals with disabilities can be construed to include former employees, but there are also a number of references in the statute to "employee" and "applicant" as the specific beneficiaries of the statutory provision. *See, e.g.*, 42 U.S.C. §§ 12112(b)(1), (2), (5)(A), (5)(B), & (7). This language should be given the same broad reading as the parallel language in section 704(a) of Title VII of the Civil Rights Act of 1964 ["Title VII"], 42 U.S.C. § 2000e-3(a) (1988) ("employees or applicants for employment"), and section 4(d) of the Age Discrimination in Employment Act of 1967 ["ADEA"], 29 U.S.C. § 623(d) (1988) ("employee or applicants for employment"), which has been read to include former employees. Permitting former employees to challenge discrimination in the provision of post-employment benefits is the only logical way to effectuate the purpose of eradicating such discrimination. The district court's more restrictive reading would undermine the ADA's remedial purposes by barring all challenges to post-employment discrimination that affects the terms, conditions, and privileges of the employment relationship. 42 U.S.C. § 12112(a). Since many employment benefits, such as pensions, disability retirement, and health insurance continuation, as in this case, do not even become available until after employment terminates, it makes no sense to bar former employees from challenging discrimination in the provision of those benefits. *See Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186, I189-90 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (holding that retirement benefits are

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[7] As a former Garner employee, Bourgeois is entitled pursuant to COBRA to elect to continue his health insurance coverage under Garner's plan for up to eighteen months following his termination from employment. 29 U.S.C. §§ 1161-62. Because Bourgeois paid the appropriate premiums for his continued coverage under COBRA, his coverage should have matched that which he would have received under Garner's plan had he not been terminated. 29 U.S.C. 1162(1).

with "compensation, terms, conditions, or privileges of employment" covered under Title VII). To hold otherwise would be to allow an employer first to fire an employee and then to discriminate against its former employee with impunity in the post-employment period by discriminatorily capping his health insurance coverage, as in this case, denying him other post-employment benefits, or retaliating against him for protected activity, as in the cases discussed below. It is inconceivable that Congress intended this gap in the protection afforded by the ADA.

This Court has construed "employee" to include former employees under section 704(a) of Title VII because "a strict and narrow interpretation of the word 'employee' to exclude former employees would undercut the obvious remedial purposes of Title VII." *Bailey v. USX Corp.*, 850 F.2d 1506, 1509-10 (11th Cir. 1988). *Accord Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1532 (11th Cir.) ("'former employees may sue for retaliation under Title VII'"), *cert. denied*, 498 U.S. 943 (1990) (citation omitted); *see also Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165-66 (10th Cir. 1977) (holding former employee can state Title VII retaliation claim and reasoning, "A statute which is remedial in nature should be liberally construed.").

Most other courts of appeals have also construed the term "employee" in section 704(a) of Title VII and section 4(d) of the ADEA to encompass former employees. In so doing, these courts have emphasized the need to interpret "employee" broadly so as to give full effect to the remedial purposes of the employment discrimination statutes, on the one hand, and to redress the range of discrimination arising from an employment relationship, on the other. For example, in an early case, the Second Circuit held that the term "employee" as used in Title VII includes "a former employee," reasoning that Title VII's purpose is to prohibit "discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct." *Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052, 1054-55 (2d Cir. 1978) (per curiam). The court rejected the district court's "narrow construction" of "employee" to exclude former employees because "such a narrow construction would not give

effect to the statute's purpose, which is to furnish a remedy against an employer's use of discrimination in connection with a prospective, present or past employment relationship to cause harm to another." *Id. See also Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 200 (3d Cir.) (Title VII) protects former employee from post-termination retaliation), *cert. denied*, 115 S. Ct. 590 (1994); *Passer v. American Chemical Soc.*, 935 F.2d 322, 330-31 (D.C. Cir. 1991) (holding former employee can state ADEA retaliation claim); *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86 (8th Cir. 1990) (holding former employee can state ADEA retaliation claim); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982) (holding former employee can state Title VII retaliation claim); *Shehadeh v. C & P Tel. Co.*, 595 F.2d 711, 722-23 (D.C. Cir. 1978) (same); *cf. Reed v. Shepard*, 939 F.2d 484, 492-93 (7th Cir. 1991) (holding Title VII provides no redress for retaliation that is "subsequent aid and unrelated to [plaintiff's] employment").

In other cases more analogous to the present case, courts have construed the term "employee" in Title VII and the ADEA to include former employees where plaintiffs challenged discrimination in the provision of post-employment benefits. For example, the Fifth Circuit rejected defendant's argument that it should dismiss, for lack of jurisdiction, a Title VII complaint brought on behalf of a former employee where defendant argued that no employment relationship existed between defendant and the charging party at the time that defendant withheld retirement and profit sharing plan benefits. *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991). *See also EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088-89 (5th Cir. 1987) (holding "employee" as used in ADEA "includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship" where plaintiff challenged employer's refusal to pay severance benefits, including continued medical insurance coverage, in retaliation for plaintiff's filing of ADEA charge); *EEOC v. South Dakota Wheat Growers Ass'n*, 683 F. Supp. 1302, 1304-05 (D.S.D. 1988) (Title VII challenge by former employee to discrimination in continuation of health insurance coverage for his wife; court notes that "the post-employment insurance coverage was available because of his earlier employment. Had there not been an employment relationship, there would not

have been a fringe benefit such as the post-employment insurance.").

Because the language of the ADA is similar to that of Title VII[9] and the ADEA, and because similar language should be construed the same way, the term "employee' in section 102 of the ADA, 42 U.S.C. § 12112(b)(1), should be construed to include former employees to effect more fully the remedial purposes of the statute. In a case of first impression, the District Court for the Northern District of Illinois denied defendant's motion to dismiss an ADA claim where defendant argued, without citation to case law, that former employees are not protected by the ADA. *Northen v. City of Chicago*, 841 F. Supp. 234, 235-36 (N.D. Ill. 1993). Plaintiffs in *Northen* were retired Chicago police officers with disabilities who received disability pensions from the city. *Id.* at 235. Plaintiffs had received "free health insurance through the city's employee health plan" until August 1, 1992, when the city changed its plan to require retirees "to pay for their own health insurance." *Id.* Plaintiffs sued, alleging violation of the ADA. *Id.* In denying the city's motion to dismiss, the court rejected defendant's argument that plaintiffs "are not employees within the meaning of the ADA," observing first that "[t]he Seventh Circuit has held that the retirement benefits are within the 'compensation, terms, conditions, or privileges of employment' covered under Title VII." *Id.* at 236 (citing *Bartmess*, 444 F.2d at 1189). The court stated further, "[t]he Seventh Circuit also has held that being an employee is not a *sine qua non* for maintaining a suit against an employer; rather, there must be an 'employment relationship' in order to maintain a suit. *Id.* (citing *Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411, 422-25

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[9] Just as the ADA's use of the term "employee" in section 102's prohibition on discrimination mirrors that in Title VII's prohibition on retaliation, the ADA's definition of "employee" as "an individual employed by an employer," 42 U.S.C. § 12111(4), is identical to that in Title VII. 42 U.S.C. § 2000e(f). The Commission has stated that "the term 'employee' [in the ADA] has the same meaning that it is given under title VII" and that the same terms "are to be given the same meaning under the ADA that they are given under title VII." Interpretive Guidance on Title I of the ADA §§ 1630.2(a) - (f), 29 C.F.R. Part 1630, App. *See also Carparts Distribution Ctr. v. Automotive Wholesaler's Assn*, 37 F.3d 12, 16 (1st Cir. 1994) (looking to Title VII for guidance in construing ADA terms).

(7th Cir. 1986)). Lastly, the court in *Northen* reasoned that amotion is "too early to conclude that retirees are not covered employees under the ADA." *Id.* at 236. The district court therefore denied the city's motion to dismiss its former employees' ADA claims. *Id.* Likewise, this Court should reverse the district court's order dismissing plaintiff's ADA claim on the ground that the ADA does not protect former employees terminated prior to the ADA's effective date.

CONCLUSION

This Court should: (1) hold that plaintiff can state a timely ADA claim pursuant to the continuing violation theory because Garner maintained its pre-ADA cap beyond the ADA's effective date; and (2) reverse the district court's order dismissing plaintiff's ADA claim on the ground that former employees are not protected by the ADA.

Respectfully submitted,

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

Mary L. Clark (by Carolyn L. Wheeler)

MARY L. CLARK
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of the General Counsel
1801 L Street, N.W.
Washington, D.C. 20507

(202) 663-4722

August 2, 1995

CERTIFICATE OF SERVICE

I, Mary L. Clark, hereby certify that two copies of the foregoing Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* have been served, this 2d day of August, 1995, by first-class mail, postage prepaid, on each of the following counsel:

Sharon Hill, Esq.
Atlanta Legal Aid Society
151 Spring Street, N.W.
Atlanta, GA 30303-2097

Eric Brandt Reuss, Esq.
P.O. Box 42055
Atlanta, GA 30342-0055

/s/ Mary L. Clark (by Carolyn L. Wheeler)
MARY L. CLARK
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of the General Counsel
1801 L Street, N.W.
Washington, D.C. 20507
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